(1)

97 - 180 JUL 28 1997

No. _____

OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1996

ROBERT L. BARR, SR., et ux.,

Petitioners,

v.

ANNE ARUNDEL MEDICAL CENTER
and ROSEMARY LETHBRIDGE, M.D.,

Respondents.

Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Fourth Circuit

PETITION FOR WRIT OF CERTIORARI

ERNEST W. MCINTOSH, JR., Esq.
Counsel of Record
ALLEN T. EATON, Esq.
LA'VERN D. WILEY, Esq.
1212 New York Avenue, N.W.
Suite 1212
Washington, D.C. 20005
(202) 789-0088

FRANK M. MCCLELLAN
230 S. Broad Street
Third Floor
Philadelphia, PA 19102
(215) 875-0600

Attorneys for Petitioners

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

61 pp

QUESTIONS PRESENTED

In a medical malpractice case where all of the Respondents (including their representatives and attorneys) are white and all of the Petitioners (including their representatives and attorneys) are black, did the trial court abuse its discretion and/or deprive the African-American Petitioners of their rights to due process and equal protection, secured by the Fifth Amendment, and rights to freedom from badges and incidents of slavery, secured by the Thirteenth Amendment, when the court precluded Petitioners from asking questions on voir dire aimed at uncovering racial bias on the part of individual members of the venire?

Did the Respondents' use of all four of their peremptory challenges to eliminate African-American women from the jury constitute such a plain and blatant violation of the Petitioners' and prospective jurors' rights to due process and equal protection, secured by the Fifth and Thirteenth Amendments, that the trial court was required, *sua sponte*, to conduct a *Batson* inquiry to protect the constitutional rights of the litigants and prospective jurors and the integrity of the judicial process, even in the absence of a *Batson* challenge raised by Petitioners? Did the trial court violate Federal Rules of Evidence 403, 611 and 1006 by admitting into evidence a blown-up summary chart prepared by Respondent's counsel and presented without testimonial sponsorship, where the chart contained numerous inaccuracies, editorial statements and arguments, and the medical records it purported to summarize consisted of only 9 pages and thus were not voluminous?

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

PETITION FOR WRIT OF CERTIORARI..... 1

OPINIONS BELOW..... 2

JURISDICTION..... 2

CONSTITUTIONAL PROVISIONS INVOLVED IN THE CASE..... 3

STATUTES AND RULES INVOLVED IN THE CASE.. 5

STATEMENT OF THE CASE..... 6

REASONS FOR GRANTING THE WRIT 9

I. THE GOAL OF AFFORDING LITIGANTS A FAIR TRIAL BY AN IMPARTIAL JURY REQUIRES HONEST AND CANDID INQUIRY ABOUT RACIAL PREJUDICE IN A CASE INVOLVING PARTIES FROM DIFFERENT RACIAL GROUPS; TAKING A "DON'T MENTION RACE" APPROACH PERMITS PERSONS TO SERVE ON JURIES WHO ARE UNFIT DUE TO EXPERIENCES OR BELIEFS THAT MAKE THEM RACIALLY BIASED.... 9

II. TRIAL COURTS SHOULD HAVE AN INDEPENDENT DUTY TO PROTECT THE RIGHTS OF ALL CITIZENS AND LITIGANTS TO PARTICIPATE IN A JURY SELECTION PROCESS THAT IS FREE FROM RACIAL DISCRIMINATION 21

III. THE DECISION OF THE COURT OF APPEALS TO AFFIRM THE JUDGMENT NOTWITHSTANDING A VIOLATION OF THE APPLICABLE FEDERAL RULES OF EVIDENCE PRESENTS AN IMPORTANT ISSUE FOR REVIEW BY THE SUPREME COURT TO RESOLVE CONFLICTING DECISIONS OF THE COURTS OF APPEALS..... 22

TABLE OF CONTENTS – Continued

Page

CONCLUSION 30

APPENDIX 1a

App. A: Opinions Below 1a

App. B: Trial Transcript Excerpts Pertaining to Jury Selection 1b

App. C: Trial Transcript Excerpts and Other Documents Pertaining to Summary Chart 1c

TABLE OF AUTHORITIES

Page

CASES

Batson v. Kentucky, 476 U.S. 79 (1986) 1, 10, 12, 21, 22

Bolling v. Sharpe, 347 U.S. 497 (1954) 13

Edmonson v. Leesville Concrete Co., 500 U.S. 614 (1991) 1, 11, 12

Hill v. State of Maryland, 339 Md. 275, 661 A.2d 1164 (1995) 12, 19

Kim v. Coppin State College, 662 F.2d 1055 (4th Cir. 1981) 28

Kotteakos v. U.S., 328 U.S. 750 (1946) 26

Ristaino v. Ross, 424 U.S. 589 (1976) 10

Rosales-Lopez v. United States, 451 U.S. 182 (1981) 10

United States v. Citron, 783 F.2d 307 (2d Cir. 1986) 24, 25, 26

United States v. King, 616 F.2d 1034 (8th Cir. 1980), *cert. denied*, 446 U.S. 969 (1980) 24

United States v. Ness, 665 F.2d 248 (8th Cir. 1981) 28

United States v. O'Connor, 237 F.2d 466 (2d Cir. 1956) 26

United States v. Smyth, 556 F.2d 1179 (5th Cir. 1977), *cert. denied*, 434 U.S. 862 (1977) 29

United States v. Virginia, 116 S.Ct. 2264 (1996) 16

United States v. Wood, 943 F.2d 1048 (9th Cir. 1991) 27

CONSTITUTIONAL PROVISIONS

U.S. Const., Amend V 3

U.S. Const., Amend VII..... 4

TABLE OF AUTHORITIES – Continued

Page

U.S. Const., Amend. XIII. 4

U.S. Const., Amend. XIV 4

STATUTES AND RULES

28 U.S.C. Sec. 1254 2

28 U.S.C. Sec. 1291 3

28 U.S.C. Sec. 1332(a)(1) 2

42 U.S.C. Sec. 1981 . . . . . 5, 15, 19

42 U.S.C. Sec. 1983 5

Fed. R. Ev. 403 . . . . . 6, 24, 27, 28

Fed. R. Ev. 802 24

Fed. R. Ev. 1006 . . . . . 6, 26, 29

OTHER AUTHORITIES

Jody Amour, STEREOTYPES AND PREJUDICE: Helping Legal Decisionmakers Break the Prejudice Habit 83 CAL. L. REV. 733 (1995). 18

M. Graham, FEDERAL PRACTICE AND PROCEDURE: Evidence (1996) 24

Michael Omi & Howard Winant, RACIAL FORMATION IN THE UNITED STATES (1994) 16, 18

Weissenberger, FEDERAL EVIDENCE (1987). 28

STATE OF CONNECTICUT JUDICIAL BRANCH TASK FORCE ON MINORITY FAIRNESS 40 (Apr. 1996) 17

TABLE OF AUTHORITIES – Continued

Page

THE GENDER AND RACE BIAS TASK FORCE PROJECT IN THE D.C. CIRCUIT, Vol. 1 at Iv.-106 (1995) 17

2 REPORT OF THE NEW YORK STATE JUDICIAL COMMISSION ON MINORITIES 186-87 (1991) 17

REPORT OF THE OREGON SUPREME COURT TASK FORCE ON RACIAL/ETHNIC ISSUES IN THE JUDICIAL SYSTEM, 73 OR. L. REV. 823, 897-98 (1994) 17

PETITION FOR WRIT OF CERTIORARI

Robert and Catherine Barr in their own behalf and on behalf of their deceased son, Robert Barr, Jr., respectfully pray that a writ of certiorari issue to review the judgment and opinion of the Circuit Court of Appeals, entered in this proceeding on April 29, 1997, in order to protect the rights of civil litigants and jurors to participate in a jury trial where the jury panel is composed of persons who have affirmatively sworn that they are capable of deciding the case on the basis of the law and the evidence, rather than on the basis of the race of the litigants or their attorneys. Petitioners ask the court to grant the writ to allow argument on the fundamental question of whether a conscious decision by a trial court to preclude inquiry about racial bias on the part of prospective jurors is compatible with the goal of affording all parties equal justice in a racially diverse society that remains plagued with problems of racial bigotry, ignorance and discrimination. Petitioners submit that it is particularly important for the Supreme Court to revisit this issue in light of the rationale of *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614 (1991) and other progeny of *Batson v. Kentucky*, 476 U.S. 79 (1986), precluding the use of race-based peremptory challenges, resting in part on the theory that trials can afford other means to keep racially biased citizens from serving on a jury.

Petitioners also request the issuance of the writ of certiorari to review the corollary issue of whether a trial court has a duty, independent of the parties, to monitor and review the use of peremptory challenges when a pattern of racial strikes develops, revealing a significant risk that citizens are being deprived of the right to serve

on the jury solely because of their race. The absence of an independent judicial responsibility leaves those important rights subject to the values possessed and strategies employed by the litigants.

Finally, Petitioners seek clarification of the standards to be employed by a trial court in deciding whether to admit summary charts as evidence, an issue about which the United States Courts of Appeals have rendered conflicting decisions.

OPINION BELOW

The Memorandum Opinion of the United States Court of Appeals For The Fourth Circuit and the opinion of the United States District Court for the District of Maryland are reprinted in Appendix A hereto ("App. A").[1]

JURISDICTION

Jurisdiction of the Supreme Court is invoked under 28 U.S.C. Sec. 1254. Jurisdiction in the District Court was founded upon diversity of citizenship where the matter in controversy exceeds $50,000, pursuant to 28 U.S.C. § 1332(a)(1). The Petitioners were domiciled in the State of New Jersey and the Respondents' place of business and domicile were in the State of Maryland. Jurisdiction

[1] Specific page cites within each Appendix will be referenced, for example as "App. 6a" or "App. 1b")

in the Court of Appeals for the Fourth Circuit was based upon 28 U.S.C. § 1291. The March 4, 1996 trial court Order from which Petitioners appealed was a final order which disposed of all claims with respect to all parties, entering Judgment in favor of both Respondents below. Petitioners below filed a Motion for New Trial on March 11, 1996 which was denied by Order of the trial court on April 1, 1996. Petitioners filed a timely Notice of Appeal to the Court of Appeals for the Fourth Circuit on April 22, 1996. The Court of Appeals issued an opinion and order on April 29, 1997, affirming the decision of the District Court.

CONSTITUTIONAL PROVISIONS INVOLVED IN THE CASE

U.S. Const., Amend V:

> No person shall be held to answer for capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any Criminal Case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. Const., Amend VII:

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States than according to the rules of the common law.

U.S. Const., Amend XIII:

Section 1. – Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to the jurisdiction.

Section 2. – Congress shall have power to enforce this article by appropriate legislation.

U.S. Const., Amend XIV:

Section 1. – All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATUTES AND RULES INVOLVED IN THE CASE

42 U.S.C. Sec. 1981: Equal Rights under the law

(a) Statement of equal rights

> All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

(R.S. Sec. 1977; Pub.L. 102-166, Title I, Sec. 101, Nov. 21, 1991, 105 Stat. 1071.)

42 U.S.C. Sec. 1983: Civil action for deprivation of rights

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purpose of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

(R.S. Sec. 1979; Pub.L. 96-170, Sec. 1, Dec. 29, 1979, 93 Stat. 1285.)

Federal Rule of Evidence 403:

> Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

Federal Rule of Evidence 1006:

> The contents of voluminous writing, recordings, or photographs which cannot conveniently be examined in court may be presented in the form of a chart, summary, or calculation. The originals, or duplicates, shall be made available for examination or copying, or both, by other parties at reasonable time and place. The court may order that they be produced in court.

I. STATEMENT OF THE CASE

Petitioners Robert Barr, Sr. and Catherine Barr instituted the present Wrongful Death and Survival actions under the law of the State of Maryland for the death of their son Robert Barr, Jr. Petitioners' complaint alleged that Robert Barr, Jr., a midshipman at the Naval Academy in Annapolis, Maryland, died on September 25, 1989 as a result of negligent medical care rendered to him in the emergency room of Anne Arundel Medical Center, where he was treated on September 12, 1989 after suffering a near drowning incident at the Naval Academy. Under the applicable Maryland wrongful death and survival statutes, the only damages recoverable for the death of a minor were the emotional distress and sorrow of the parents and the pain and suffering of the decedent.

Trial commenced on Tuesday, February 20, 1996 and ended on March 1, 1996 with a jury verdict rendered in favor of Respondents, Rosemary Lethbridge, M.D. and Anne Arundel Medical Center. The jury verdict was based on its answers to special interrogatories concerning whether either of these two Respondents were negligent and, if so, whether the negligence was the cause of the death of Robert Barr, Jr. The jury answered the interrogatories by stating that neither of the Respondents was negligent. Therefore, the jury did not reach the issue of causation or damages.

The trial court entered judgment on the jury verdict on March 4, 1996. Petitioners filed a timely motion for a new trial asserting the following grounds, among others.

(a) The court erred in granting the Respondents 4 peremptory challenges while granting Petitioners only 3 peremptory challenges where the Respondents were presenting a joint defense and no cross claims were filed. As a consequence, Petitioners were denied the opportunity to litigate this case on a level playing field.

(b) The Respondents used their four peremptory challenges to strike four African American women on the basis of their race, in violation of the rights of Petitioners and prospective jurors to Equal Protection and Due Process as guaranteed by the Fifth and Fourteenth Amendments of the United States Constitution.

(c) The court erred in refusing to ask the venire whether any of them held views based on race that would impair their ability to decide this case based on the law and the evidence.

(d) The court erred in admitting into evidence a time chart, blown up to poster board size, purporting to summarize the care rendered to Robert Barr, Jr. in the emergency room where no witness offered by Respondents testified to the accuracy of the time chart, the chart was admittedly prepared by defendant Lethbridge's counsel, and Petitioners' expert witness, Dr. Neuman, testified that the chart was inaccurate. Since the chart purported to represent care rendered and monitoring activities, it went to the heart of Petitioners' claim of negligence and cannot be characterized as harmless error.

The trial court denied Petitioners' Motion for a New Trial on the basis that "the Motion is not supported by applicable law". (App. 6a) The Court of Appeals concluded that the admission of the summary chart was error. Nevertheless, the court affirmed the judgment, stating: "This error does not require reversal, however, given the extensive evidence in the record supporting the jury's verdict.

None of the other issues gives us cause to reverse the district court." (App. 4a)

REASONS FOR GRANTING THE WRIT

I. The Goal Of Affording Litigants A Fair Trial By An Impartial Jury Requires Honest And Candid Inquiry About Racial Prejudice In A Case Involving Parties From Different Racial Groups; Taking A "Don't Mention Race" Approach Permits Persons To Serve On Juries Who Are Unfit Due To Experiences Or Beliefs That Make Them Racially Biased.

No reasonable person would argue that citizens or their representatives should be precluded from investigating or inquiring about the ability of a judicial candidate to treat all individuals fairly, regardless of their race. Clearly, the ability to treat all people fairly and equally is an essential qualification for a person vested with the power to resolve conflicts among persons of all races. Yet, when it comes to bestowing the power on jurors to resolve disputes between private parties from different racial or ethnic backgrounds, many federal trial judges exercise their discretionary power to preclude any specific inquiry about the prospective jurors' ability to treat persons from different races equally and fairly. Indeed, that was the approach taken by the trial judge in the case below which involved a medical malpractice claim brought by plaintiffs who were African Americans against respondents who were all white. Petitioners respectfully request that the Supreme Court grant a Writ of Certiorari to review whether this approach is fair and makes sense in a multi-racial society that seeks to involve the broadest possible cross section of citizens to serve as jurors and to rely on the judicial system for a just resolution of their conflicts.

The proper manner for courts to handle the complex problem of racism in the civil litigation process is a critical issue that has not been explored in depth by the Supreme Court since it began addressing peremptory strikes in *Batson* and its progeny. More than twenty years ago the Supreme Court held that the difference in race of a crime victim and the accused perpetrator of the crime did not by itself cause the need to question veniremen specifically about racial prejudice to rise to constitutional dimensions. *Ristaino v. Ross*, 424 U.S. 589 (1976). Five years later, the Supreme Court, in a plurality opinion by Justice White, refused to invoke its supervisory power to hold that federal trial courts must specifically inquire into racial or ethnic prejudice during voir dire when requested to do so by a defendant who is not accused of a violent crime, even though the defendant and victim are members of different racial or ethnic groups. *Rosales-Lopez v. United States*, 451 U.S. 182 (1981). In so ruling, the Supreme Court acknowledged that in some circumstances inquiry concerning racial bias is so important that it should not be committed exclusively to the discretion of individual trial courts. The Supreme Court has not, however, considered the question of whether the holdings and rationale of *Batson* suggest the need for a different approach to voir dire, based either on a constitutional analysis or an exercise of the Supreme Court's supervisory powers.

Batson and its progeny should prompt the Supreme Court to recognize and expressly acknowledge that the use of peremptory challenges on a racially discriminatory basis is only one aspect of a complex problem in which racial attitudes and stereotypes threaten the ability of the judicial system to provide equal treatment to all litigants,

jurors, witnesses and attorneys. In *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614 (1991), the Supreme Court struck down the race-based use of peremptory challenges in civil cases as violative of the Due Process and Equal Protection rights of jurors, notwithstanding the undeniable reality of continued racism and discrimination in our society and the consequent danger that racial bias will infect jury decision-making. The Court states in *Edmonson* that one reason that racially based peremptory challenges are intolerable, despite the lurking danger of biased jury decision-making, is that the courtroom allows for other means to protect against racially biased jurors participating in a case. Speaking for a majority of the court, Justice Kennedy observed:

> Other means exist for litigants to satisfy themselves of a jury's impartiality without using skin color as a test. If our society is to continue to progress as a multiracial democracy, it must recognize that the automatic invocation of race stereotypes retards that progress and causes continued hurt and injury. . . . The quiet rationality of the courtroom makes it an appropriate place to confront race-based fears or hostility by means other than the use of offensive stereotypes . . . And *if a litigant believes that the prospective juror harbors the same biases or instincts, the issue can be explored in a rational way that consists with respect for the dignity of persons, without the use of classifications based on ancestry or skin color.*
>
> 500 U.S. at 630-31. (emphasis supplied)

Petitioners sought to follow the admonition of the Supreme Court in *Edmonson* during the trial of the case

below by raising the issue of potential bias during voir dire, attempting to treat each juror with respect and not presuming knowledge of an individual's attitude toward race based on the individual's race. In this way Petitioners sought to confront the reality that if fifty citizens are brought into a room and asked to sit in judgment on a dispute, some may well be affected by the race of the parties when they see that sitting on one side of the room are all black people and on the other side of the room are all white people. Raising the issue in voir dire satisfies the admonition in *Edmonson* to explore the harboring of biases in a rational way. This approach has received support in state court in Maryland, where the case below was tried. *See Hill v. State of Maryland,* 339 Md. 275, 61 A.2d 1164 (1995), discussed *infra* at 19-20.

Batson addresses the potential invocation of racial prejudice and stereotyping on the part of the parties and their counsel by prohibiting the use of peremptory challenges based on race. However, *Batson,* without more, leaves untouched the potential that racism on the part of individual jurors would disrupt the decision-making process. It is this problem that Petitioners ask the Supreme Court to explore through a grant of a Writ of Certiorari.

The trial court exercised discretion in this case to preclude any specific inquiry about the racial prejudice on the part of any prospective juror. The present case presents a substantial question concerning whether the trial court's refusal to inquire regarding racial attitudes was an abuse of discretion that deprived the Petitioners of their rights to Due Process and Equal Protection of the

laws under the Fifth Amendment,[2] and the guarantee of a fair and impartial jury under the Seventh Amendment. In light of the fact that Petitioners and their attorneys are African Americans and Respondents and their attorneys are white Americans, Petitioners were understandably concerned that some members of the venire could hold beliefs about race that would preclude them from rendering a fair verdict in a case involving a dispute between members of different races. Consequently, in an effort to identify jurors with backgrounds, associations or experiences that would make them predisposed toward or against a party because of race, Petitioners requested the trial court to ask the venire whether any member had feelings regarding the race of the parties or their attorneys that would preclude them from deciding this case based solely on the evidence and the law.[3] When it was brought to the court's attention that the requested question

---

[2] *See Bolling v. Sharpe*, 347 U.S. 497 (1954) (effectively reading equal protection guarantee into the due process clause of the Fifth Amendment).

[3] Plaintiffs submitted as their 18th request for a *voir dire* question the following:

"Ladies and gentlemen, I'm concerned about something in this case. It's something people don't like to talk about, but that I'm sure you'll all agree that this is a problem in our society that sometimes results in unfair treatment. What I'm talking about is racial prejudice. Mr. and Mrs. Robert L. Barr, Sr. are Black; their lawyers, Mr. McClellan, Mr. Eaton, Ms. Wiley and Ms. Rigmaiden-DeLeon are also Black. Dr. Lethbridge and her attorneys are white. The attorneys for defendant Anne Arundel Medical Center are also white. Now I need to ask you, and I know you'll all look deep into your own hearts in considering your answer, whether any of you feel that you couldn't be fair to the parties on either side of this case because of their race?"

had not been asked, the court expressed the view that the matter had been covered. (App. 3b)[4] In fact, the question had not been addressed. A review of the transcript reveals that the closest the trial court came to inquiring about racial bias were two general and abstract questions:

> If you or [sic] one of the parties in the case, either the Plaintiffs, the parents of the Midshipman or the Defendants, Dr. Lethbridge, or the Anne Arundel Medical Center, do you know of any reason you would not be content to have the case tried by someone in your present frame of mind? I note no response. (App. 1b.)

> If you are selected to sit on this case, would you be unable or unwilling to render a verdict solely on the evidence that is presented at the trial and the law as I give it to you in the course of my instructions, disregarding any other ideas, notions or beliefs about the law that you may have encountered, in reaching your verdict? I note no response. (App. 1b-2b.)

From the perspective of a potential juror, what did the judge mean by these questions? They are so broad that it could mean anything or nothing, but would not likely trigger a reflection about a potential juror's racial attitudes. The court had otherwise failed to address the issue of racial prejudice in any of its voir dire questions. Neither had the court addressed the inappropriateness of racial bias in its instructions and admonitions to the jury. In short, Petitioners' request of the court to take some action to enhance the likelihood of selecting a jury that

---

[4] Excerpts from the trial transcript relevant to the voir dire issues raised in this Petition are contained in Appendix B.

would not be unduly influenced by race was left unaddressed.

Petitioners submit that the goal of empaneling a fair and impartial jury of citizens who could decide the case on a basis not impaired by racial bias requires more attention. Many citizens engage in racist conduct every day while adhering to a view that preferential or subordinating treatment based on race is fair. Racial bias is sometimes conscious and sometimes unconscious. However, one thing is clear: few people are willing to acknowledge that they harbor racial prejudices if they are not specifically asked about their views, attitudes and experiences that are race-based. Even when asked, most want to hold themselves out as non-racist when they sit among a room full of strangers. Nevertheless, asking the question in the context of jury selection may serve an important salutary function, even when the answers are not candid. Petitioners submit that if African Americans are to be accorded an equal opportunity to litigate tort cases on their merits in majority white communities, a more realistic approach to the dangers of racism must be taken, including affording an opportunity to confront the potential for biased decision-making which may lurk in the silence of the courtroom. Ignoring the substantial and potentially devastating risk that a racially biased individual may be among the prospective jurors subjects African Americans to an unnecessary continuation of discrimination and inequality which the Thirteenth Amendment and 42 U.S.C. Sec. 1981 seek to eliminate. Without the ability to gather information about bias, there will be

little opportunity to meaningfully protect against racially biased decision-making in the civil litigation process.[5]

We live in a society where race is a fundamental part of the social fabric. Unfortunately racism is a fact of every day life. In one of the most illuminating books published in recent years about the presence of race in America, the authors conclude:

> In the U.S., race is present in every institution, every relationship, every individual. This is the case not only for the way society is organized – spatially, culturally, in terms of stratification, etc. – but also for our perceptions and understandings of personal experience. Thus as we watch the videotape of Rodney King being beaten, compare real estate prices in different neighborhoods, select a radio channel to enjoy while we drive to work, size up a potential client, customer, neighbor or teacher, stand in line at the unemployment office, or carry out a thousand other normal tasks, we are compelled to think racially, to use the racial categories and meaning systems into which we have been socialized.
>
> Michael Omi & Howard Winant, RACIAL FORMATION IN THE UNITED STATES 158-59 (1994) [hereinafter RACIAL FORMATION].

Omi & Winant's observations apply with special force and take on enhanced importance when applied to

---

[5] As Justice Ginsburg suggests in *United States v. Virginia*, 116 S. Ct. 2264, 2274-75 (1996) there is justification in being skeptical about the fairness of the decision-making process where there has been a long history of discrimination against a particular group.

our system of justice. They articulate what has also been acknowledged in studies of the litigation process. During the past ten years numerous commissions have conducted studies to determine whether race and gender biases are affecting the justice system. The commissions have found that many judges, attorneys and litigants perceive that serious problems of racial bias exist.[6]

The pivotal issue, however, is whether an individual's attitudes, feelings or preferences that are widely shared by members of one racial group but disliked or disapproved by many members of another racial group will impact on a person's decision-making when he or she is empowered to resolve disputes that involve members of different races opposing each other. Omi and Winant set forth a prescription that warrants adoption in the judicial setting:

> So today more than ever, opposing racism requires that we notice race, not ignore it, that

---

[6] Significantly, most studies reveal that minority judges, attorneys and litigants perceive racially biased decision-making to be pervasive, while white judges and attorneys do not perceive the problem to be as widespread. *See e.g.*, 2 REPORT OF THE NEW YORK STATE JUDICIAL COMMISSION ON MINORITIES 186-87 (1991); REPORT OF THE OREGON SUPREME COURT TASK FORCE ON RACIAL/ETHNIC ISSUES IN THE JUDICIAL SYSTEM, 73 OR. L. REV. 823, 897-98 (1994); STATE OF CONNECTICUT JUDICIAL BRANCH TASK FORCE ON MINORITY FAIRNESS 40 (Apr. 1996). Notably, in the District of Columbia white attorneys perceive black litigants to have an advantage while black attorneys do not share the perception of a black advantage. *See* THE GENDER AND RACE BIAS TASK FORCE PROJECT IN THE D.C. CIRCUIT, Vol.1 at Iv.-106 (1995)

> we afford it the recognition it deserves and the subtlety it embodies. By noticing race we can begin to challenge racism, with its ever-more-absurd reduction to human experience to an essence attributable to all without regard for the historical or social context. By noticing race we can challenge the state, the institutions of civil society, and ourselves as individuals to combat the legacy of inequality and injustice inherited from the past. By noticing race we can develop the political insight and mobilization necessary to make the U. S. a more racially just and egalitarian society. RACIAL FORMATION, *supra* at 159.

The important task is how to minimize and control the impact of racism in a civil trial where a jury must resolve an important and emotional conflict between parties of different races. Petitioners submit that in this context compelling lawyers and potential jurors to pretend that they enter the process "colorblind" places severe barriers in the path of an African American litigant seeking a fair trial unaffected by racial bias. In effect, a "don't ask, don't tell" approach to considering potential jurors' attitudes about race, transforms the "colorblind" ideal from a virtuous goal into a shield for racist conduct and decision-making.[7] Whether the racism is conscious or

---

[7] Notably, social science studies reveal that specific questions about potential jurors' personal views of race are required to elicit meaningful responses about racial bias. *See* Jody Armour, *Stereotypes and Prejudice: Helping Legal Decision-makers Break the Prejudice Habit*, 83 CAL. L. REV. 733 (1995)(reviewing social science studies that conclude that many people are able to overcome stereotypes and prejudice if they are made conscious of prejudiced habits)

unconscious, such an approach to voir dire is unfair, unjustified and unrealistic. It raises substantial questions concerning whether precluding an opportunity for minority litigants to identify veniremen with racial biases violates federal guarantee of "like pains and punishments" in the trial process underscored in 42 U.C.S. Sec. 1981.

In the present case, the voir dire question that Petitioners requested regarding racial bias was a rational and fair attempt to discover whether prospective jurors harbored racial bias. The question would have allowed exploration of this important and sensitive issue in a manner that respected the dignity of the prospective jurors. A trial court's refusal to face the real potential of racism infecting jury decision-making places members of racial minority groups at a distinct disadvantage, subjecting them to the risk of a racially motivated verdict and depriving them of the means to assess or prove what effect racism played in the case. Petitioners contend that an opportunity to inquire and strike jurors who are racially biased is not only fair and sound judicial administration, it is essential to assure that all litigants are afforded Due Process and Equal Protection of the laws in civil cases and complements the safeguards of *Batson*.

The Maryland Court of Appeals held recently that as a matter of common law, the trial court abused its discretion by refusing to ask a voir dire question regarding racial or ethnic bias in a case involving drug possession by a black defendant where the only witness to the crime was the white police officer who made the arrest. *Hill v. State of Maryland*, 339 Md. 275, 661 A.2d 1164 (1995). In response to the argument that allowing questions regarding racial or ethnic bias would be detrimental to the

administration of the law in the courts, the Maryland Court of Appeals responded by quoting *Aldrige v. United States*, 283 U.S. 308, at 314-315:

> We think that it would be far more injurious to permit it to be thought that persons entertaining a disqualifying prejudice were allowed to serve as jurors and that inquiries designed to elicit the fact of disqualification were barred. No surer way could be devised to bring the processes of justice into disrepute.

661 A.2d 1164, 1169.

The issue raised here is one of the most important ones affecting the rights of civil litigants in the multi-racial, multi-cultural society that we live in today. All parties are entitled to a trial untainted by racial bias and asking voir dire questions aimed at discovering racial bias is an important procedural safeguard. A safeguard such as this ought to have been employed in the present case to better assure that the case was litigated on a level field.

For the reasons set forth above, Petitioners respectfully request that the Court issue a Writ of Certiorari to consider the question of whether as a matter of judicial rule or Constitutional rights, a civil litigant should be able to ask limited and specific questions to assess whether a potential juror is unfit to sit in judgment in a particular case based on his attitudes and prejudices related to the race of any of the parties to the lawsuit. In short, Petitioners ask the Court to explore whether the present approach of judicial discretion to ask or not ask about racial prejudice of potential jurors affords parties a fair trial in a society still struggling with widespread racial prejudice among its citizens.

II. Trial Courts Should Have An Independent Duty To Protect The Rights Of All Citizens And Litigants To Participate In A Jury Selection Process That Is Free From Racial Discrimination.

Petitioners ask that the Supreme Court consider the related, but severable question whether the trial court has an independent duty to protect the rights of litigants and prospective jurors from racial discrimination in the jury selection process. In the case below, Petitioners contend that the trial court's approach to jury selection adversely impacted on the selection of a fair and impartial jury, compromising Petitioners' ability to present their case on a level playing field and offending the rights of potential jurors. First, over Petitioners' objection, the court granted the Respondents four peremptory challenges while limiting Petitioners to three peremptory challenges. Second, as described in detail above, the court refused to inquire of the venire whether any member had beliefs, feelings, attitudes or experiences related to race that would not allow him or her to be fair to the litigants in the present case where the Petitioners and their attorneys were black and the Respondents and their attorneys were white. Finally, the trial judge witnessed the Respondents' use of all four of their peremptory challenges to strike four African American women and raised no questions. The jury panel ultimately seated included only one African American man and no African American women.

Petitioners did not make a *Batson* challenge because they were concerned about raising the racial issue before a trial judge who had just ruled that race was not of special concern in this case, refusing to ask a question

about racial attitudes or experiences. Recognizing that the court was vested with tremendous power to exercise discretion on many issues involving jury selection and evidence, Petitioners chose not to request a *Batson* hearing. African American litigants, and other litigants of color, should not be burdened with the sole responsibility of protecting the judicial process from the taint of racism by having to inject the racial issue into the court's view at each stage of the proceeding and risking a loss of focus on the law and evidence relevant to their substantive claim. Since the constitutional rights of prospective jurors were also at stake, Petitioners submit that the trial court had a legal and ethical duty to monitor the jury selection process and to take action to protect the constitutional rights of prospective jurors and litigants when the pattern of using peremptory strikes on the basis of race became apparent. Otherwise, the rights of prospective jurors to be free from racial discrimination in the jury selection process will depend entirely on the strategies and racial attitudes of the parties and counsel involved in a particular case.

III. The Decision Of The Court Of Appeals To Affirm The Judgment Notwithstanding A Violation Of The Applicable Federal Rules Of Evidence Presents An Important Issue For Review By The Supreme Court To Resolve Conflicting Decisions Of The Courts Of Appeals

The Court of Appeals for the Fourth Circuit acknowledged in its opinion that the admission of the time chart prepared by counsel for the Respondents below was

error, but affirmed the judgment on the basis that the error was not prejudicial to plaintiffs below because sufficient evidence was introduced to substantiate "the majority" of information in the chart. (App. 4a) The court's finding misses the point and places the Fourth Circuit in conflict with other circuits in terms of the interpretation of the importance of the carefully crafted safeguards embodied in the Federal Rules of Evidence pertaining to the admissibility of a summary. Other courts have recognized that a summary poses a real danger to a fair jury verdict if the opposing party does not have an opportunity to review the summary for accuracy and cross examine the preparer of the summary concerning disputed matters included. Whether a majority of the summary is accurate and other evidence is offered to support a verdict in favor of the offering party is beside the point. A party should not be allowed to gain a considerable advantage through a document that purports to be evidence when in fact it is one party's version of disputed facts and contains inaccurate information along with the party's argument and editorial comments. In effect, the court gives its imprimatur to the arguments of one of the litigants when it allows the jury to consider the litigant's argument under the guise of probative evidence.

As more fully set forth below, the approach taken by the Court of Appeals in this case allows a party to manufacture false and misleading evidence, introduce it to the jury, present a closing argument on the basis of the misleading evidence, and later persuade a court to uphold the verdict on the ground that the improper admission of the evidence was harmless error.

The opinion in this case squarely conflicts with the opinions rendered by other United States Courts of Appeal. One commentator succinctly describes the rule that most courts have adopted: "Introduction of a summary absent the opportunity to cross-examine with regard to its preparation should be prohibited under Rule 403, if not by operation of the rule against hearsay, Rule 802." M. Graham, Federal Practice and Procedure: Evidence, Sec. 7031 (1996); *United States v. King*, 616 F.2d 1034, 1041 (8th Cir. 1980), *cert. denied*, 446 U.S. 969, 100 S.Ct. 2950, 64 L.Ed.2d 829 (1980) (recognizing the proper use of "charts *which fairly summarize the evidence*" and which "are *used as an aid in understanding the testimony* already introduced" if the "*witness who prepared the charts is subject to cross-examination* with all documents used to prepare the summary") (emphasis added).

The United States Court of Appeals for the Second Circuit carefully considered the issue of admissibility of a summary chart in *United States v. Citron*, 783 F.2d 307, 316 (2d Cir. 1986) and reached a decision contrary to that reached by the Fourth Circuit in the present case. In *Citron* the defendant was charged with tax evasion and the prosecution presented a chart which purported to show the defendant's available funds. The government failed to provide testimony or other explanation as to how the figures were derived. The court not only did not consider whether the chart was based on the evidence, it deemed the chart "doubletalk" and admitted it anyway. Such action was found to be an abuse of discretion. *Citron* at 316.

In *Citron*, the figures on the chart were the crux of the prosecution's case. A slight difference in the figures presented would have directly reduced the defendant's liability for under-reporting his income. In the instant case, slight differences in the Timeline would have directly affected how the jury determined the negligence of the Respondents. The key issue in the case below was whether Dr. Lethbridge, the emergency room physician who treated Midshipman Barr, conformed to the standard of care required to monitor a victim of a near drowning episode. More particularly, in dispute was when she and the nurses recognized that Midshipman Barr was in respiratory failure and what specific action they took to monitor and treat him. The "Timeline of Care", or summary chart, prepared by defense counsel in the case below, purported to represent a timeline of events during the time Petitioners' decedent, Midshipman Robert Barr, Jr., was in the emergency room at Anne Arundel Medical Center. The documents relevant to the summary chart are contained in Appendix C.[8] However, the summary contained numerous inaccuracies, material omissions, and editorial comments. The summary had never been produced by defense counsel for examination prior to trial

---

[8] The errors were detailed for the Court of Appeals at pages 17-19 of Petitioners' brief (See App. 5c-8c). After the oral argument, Respondents submitted a supplemental statement in support of the accuracy of the chart. By consulting this supplement and placing weight on it, the Court of Appeals, once again, undermined the Rules of Evidence at issue. The point is that these facts were in dispute and Respondents were erroneously allowed to submit a chart representing their version of the facts, and the jury took the chart for consideration as evidence when they deliberated.

and Respondents failed to lay any foundation for its admission, either by way of explaining how its contents were derived from source documents or from testimonial sponsorship. These inaccuracies had the effect of showing that Midshipman Barr received more monitoring and medical care than the actual records indicate. The admission of such an inaccurate summary cannot be chalked up to harmless error. *Citron* at 316, *citing Kotteakos v. United States*, 328 U.S. 750, 764-65, 66 S. Ct. 1239, 1247-48, 90 L.Ed. 1557 (1946).

The rationale relied on by the Second Circuit in *Citron* is uncomplicated and widely accepted: "Courts have long required that district courts ascertain that summary charts 'fairly represent and summarize the evidence upon which they are based.' " *United States v. Citron*, 783 F.2d 307, 316 (2d Cir. 1986), *citing*, *United States v. O'Connor*, 237 F.2d 466, 475 (2d Cir. 1956). "Unless this requirement is met, the chart is more likely to confuse or mislead the jury than it is to assist it." *United States v. Citron*, 783 F.2d 307, 316 (2d Cir. 1986), *citing*, Fed.R.Evid. Rule 403. (finding reversible error in the admission of a chart that does not fairly represent and summarize the evidence).

Federal Rule of Evidence 1006 provides for the admission of a chart or summary if a "voluminous writing" cannot be conveniently examined in court, provided that both parties have an opportunity to examine the underlying documents. However, Rule 1006 does not provide a basis for the introduction of the Timeline used by Respondents at trial, because the emergency room records that the Timeline purported to represent were only 9 pages and consequently could not be considered voluminous. In addition, the Petitioner's entire medical

record, including the emergency room record, were introduced into evidence. In this situation, the United States Court of Appeals for the Ninth Circuit has emphasized an important distinction between a summary admitted pursuant to Rule 1006 and a summary admitted as demonstrative evidence. In *United States v. Wood*, 943 F.2d 1048, 1053 (9th Cir. 1991) the Court explained: "summaries of testimony or documents already admitted into evidence are merely pedagogical devices, and are not evidence themselves. . . . [S]uch pedagogical devices should be used only as a testimonial aid, and should not be admitted into evidence or otherwise be used by the jury during deliberations."

As noted, in the case below, the trial court admitted the Timeline and allowed it to go out to the jury. To excuse such an egregious and prejudicial error as harmless is to ignore the rule, consequently establishing a clash in the true meaning and effect of the rule in the Ninth and Fourth Circuits.

Weissenberger's Federal Evidence provides a thorough explanation of the admissibility of a summary as evidence:

> "For a summary calculation or chart to be admissible under Rule 1006, three conditions must be satisfied. First, the writings . . . must be voluminous. . . . The requirement that writings . . . be voluminous satisfies the general objective of this Rule, i.e., maximizing the convenience of the presentation of evidence at trial. Additionally, an issue of fairness, undue delay or redundancy under Rule 403 may be involved where the writings . . . are not voluminous. Second, a proper foundation must be laid for the

> introduction of the summary. . . . *Additionally, charts, summaries, and calculations may not include information not contained or computed from the originals.*

Weissenberger's Federal Evidence Sec. 1006.1, 1987. (emphasis supplied)

Consistent with this explanation, most courts have insisted that a summary accurately reflect the original records, and must not violate Rule 403's prohibition of undue prejudice, delay and redundancy.[9] Rule 403 provides for exclusion of evidence based on confusion where the evidence offered would require the trier of fact to "engage in intricate, extraordinary or impossible mental gymnastics in order to comprehend the import of the evidence or to assess its weight." Weissenberger's Federal Evidence, *supra* Sec. 403.4. Furthermore, "if the jury is likely to ascribe excessive, unwarranted weight to the evidence, the offered proof is a candidate for exclusion under Rule 403." *Id.* Finally, in any situation in which the jury will be at a loss to gauge the proper application or weight of the evidence, Rule 403 may operate to exclude such evidence. *Id.*; *Kim v. Coppin State College*, 662 F.2d 1055, 1058 (4th Cir. 1981); *United States v. Ness*, 665 F.2d 248, 250-51 (8th Cir. 1981).

---

[9] Rule 403 of the Federal Rule of Evidence, provides as follows: "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."

The Fourth Circuit recognized in this case that the admission of the chart was error. However, the Circuit Court upheld the judgment on the ground that the error was not prejudicial. The court reached this conclusion notwithstanding the specification by Petitioner of nineteen separate discrepancies between the original record and the Timeline of care and the fact that the trial court admitted the chart into evidence in blow-up form, mounted on posterboard, and allowed it to be examined by the jury during deliberations. (App. 9c-10c) It is reasonable to conclude that an exhibit blown up and presented on posterboard will carry more weight with a jury than 8 1/2" by 11" sheets of paper on which the actual medical records appear. Countenancing such a serious error in the admission of evidence that goes to the central factual issues in dispute in the litigation undermines the basic purposes of the applicable Federal Rules of Evidence that were carefully crafted to avoid jury verdicts based on unreliable and misleading evidence. *See, e.g.*, M. Graham, Federal Practice and Procedure: Evidence Sec. 7031 (1996) (Rule 1006 "may not be employed as a guise for placing before the jury an argumentative synopsis of oral testimony or documentary evidence"); *United States v. Smyth*, 556 F.2d 1179, 1184 n. 12 (5th Cir. 1977), *cert. denied*, 434 U.S. 862, 98 S.Ct. 190, 54 L.Ed.2d 135 (1977) (in light of the fact that Rule 1006 has elevated summaries to the status of evidence, care must be taken to avoid argumentative matter lest the jury believe that such matter is itself evidence of the assertion it makes).

The opinion of the Fourth Circuit Court of Appeals in this case violates clear evidentiary standards, undercuts

the basic goals of the Federal Rules of Evidence applicable to summaries and leaves the law of the Circuits in conflict regarding an important evidentiary issue that arises in almost every civil case that presents complicated factual issues.

CONCLUSION

To resolve the conflict among the Circuits on a recurring issue arising under the Federal Rules of evidence and to clarify important issues of Constitutional and federal law, Petitioners pray that this Honorable Court will issue a Writ of Certiorari in this case.

Respectfully submitted,

EATON & MCCLELLAN

ERNEST T. MCINTOSH, JR. ESQ.
Counsel of Record
ALLEN T. EATON
LA'VERN T. WILEY
1212 New York Avenue, N.W.
Suite 1212
Washington, D.C. 20005
(202) 789-0088

FRANK M. MCCLELLAN
230 S. Broad Street
Third Floor
Philadelphia, PA 19102
(215) 875-0600

Attorneys for Petitioners

APPENDIX A

Court Opinions

UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

ROBERT L. BARR, SR., Individually and as Administrator of the Estate of Robert L. Barr, Jr.; CATHERINE BARR, Individually, *Plaintiffs-Appellants,* v. ANNE ARUNDEL MEDICAL CENTER; ROSEMARY LETHBRIDGE, M.D., *Defendants-Appellees.*	No. 96-1594

ROBERT L. BARR, SR., Individually and as Administrator of the Estate of Robert L. Barr, Jr.; CATHERINE BARR, Individually, *Plaintiffs-Appellants,* v. ANNE ARUNDEL MEDICAL CENTER, *Defendant-Appellant,* and ROSEMARY LETHBRIDGE, M.D., *Defendant.*	No. 96-1639

Appeals from the United States District Court
for the District of Maryland, at Baltimore.
Joseph H. Young, Senior District Judge.
(CA-95-1003-Y)

Argued: April 7, 1997

Decided: April 29, 1997

Before RUSSELL, WILKINS, and MOTZ, Circuit Judges.

Affirmed by unpublished per curiam opinion.

COUNSEL

ARGUED: Frank McClellan, EATON, MCCLELLAN & ALLEN, Philadelphia, Pennsylvania, for Appellants. James Thomas Wharton, WHARTON, LEVIN, EHRMANTRAUT, KLEIN & NASH, P.A., Annapolis, Maryland; Kurt D. Karsten, COWDREY, THOMPSON & KARSTEN, P.A., Annapolis, Maryland, for Appellees. **ON BRIEF:** Christian A. Lodowski, WHARTON, LEVIN, EHRMANTRAUT, KLEIN & NASH, P.A., Annapolis, Maryland, for Appellee Lethbridge.

Unpublished opinions are not binding precedent in this circuit. See Local Rule 36(c).

OPINION

PER CURIAM:

Robert L. Barr, Sr., on behalf of himself and his wife, and as administrator of the estate of his son, Robert L. Barr, Jr., appeals the judgment of the district court in a wrongful death suit. Robert L. Barr, Jr. was a midshipman at the United States Naval Academy, where, on September 12, 1989, he suffered a near-drowning accident in a swimming pool. Witnesses testified that Barr Jr. was found near the bottom of the pool with reddish and white mucous fluid coming out of his mouth. Rescuers saved Barr and resuscitated him with CPR. One witness testified that Barr Jr. vomited at least a quart of fluid while he was being resuscitated.

Emergency medical personnel transported Barr Jr. to Anne Arundel Medical Center ("AAMC") by ambulance, where he was attended by the emergency room physician, Rosemary Lethbridge, M.D. After receiving treatment, Barr Jr. was transferred to the Intensive Care Unit, where he developed a lung infection. After another transfer, to the University of Maryland Shock Trauma Center, he died on September 25, 1991.

Barr Sr. filed suit against AAMC and Dr. Lethbridge. He asserted a wrongful death action against AAMC, claiming that AAMC's agents and employees were negligent in the medical care they provided Barr Jr. Barr Sr. also claimed that Dr. Lethbridge's treatment of Barr Jr. fell below the applicable standard of care, and contributed to his death. An eight-day jury trial followed. The jury returned verdicts in favor of both defendants.

The district court denied the plaintiffs' motion for a new trial. On appeal, Barr Sr. raises five issues: (1) the verdict was against the great weight of the evidence; (2) the court admitted an inaccurate summary of care prepared by the defendants; (3) the district court improperly awarded each defendant two peremptory challenges; (4) the court abused its discretion in refusing to inquire about the racial attitudes of the venire; and (5) the defendants used all of their peremptory challenges to strike four African-Americans.

We have carefully reviewed the record, considered the submissions of the parties, and heard oral argument. We find that the record supports the majority of the information in the summary chart. Any other inaccuracies are immaterial. Nonetheless, the summary chart should have been authenticated by its preparer before the district court admitted it. This error does not require reversal, however, given the extensive evidence in the record supporting the jury's verdict.

None of the other issues give us cause to reverse the district court. Accordingly, we affirm the judgment of the district court.

AFFIRMED.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

ROBERT L. BARR, SR. et al	*	
vs.	*	CIVIL ACTION NO. Y-95-1003
ANNE ARUNDEL MEDICAL CENTER	*	
DR. ROSEMARY LETHBRIDGE	*	

****

ORDER OF JUDGMENT

The jury having returned a verdict in favor of Defendants Anne Arundel Medical Center and Rosemary Lethbridge, it is this 4th day of March, 1996, ORDERED

1. That judgment is entered in favor of Defendants Anne Arundel Medical Center and Rosemary Lethbridge M.D.

2. Any and all prior rulings made by the Court disposing of any claims against any parties are incorporated by reference herein, and this Order shall be deemed to be a final Judgment within the meaning of Fed. R. Civ. P. 58:

/s/ Joseph H. Young
Joseph H. Young
Senior United States
District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

ROBERT L. BARR, SR., et al.	*	
v.	*	CIVIL NO. Y-95-1003
ANNE ARUNDEL MEDICAL CENTER, INC., et al.	*	

ORDER

Plaintiffs, parents of Robert Barr, Jr., filed a Wrongful Death Action against Anne Arundel Medical Center and Rosemary Lethbridge, M.D. alleging that Robert Barr, Jr. died as a result of negligent medical care received in the Emergency Room of Anne Arundel Medical Center. Following an eight-day trial, the Jury returned its verdict by answering issues submitted to it on a Verdict Form. The Jury found that neither defendant breached the appropriate standard of care owed to Robert Barr, Jr. The court then entered judgment in favor of the defendants, Anne Arundel Medical Center and Rosemary Lethbridge, M.D.

Plaintiffs then filed a Motion for New Trial alleging that the verdict was against the weight of the evidence, that the Court committed error in the selection of the jury, and in admitting certain evidence.

Having reviewed the Motion for New Trial, the evidence introduced at trial, and the memoranda submitted by the parties, the Court finds the Motion is not supported by the applicable law and must be denied.

Accordingly, it is this 1st day of April, 1996, by the United States District Court for the District of Maryland, ORDERED:

1. That the plaintiffs' Motion for New Trial BE, and the same IS, hereby DENIED;

2. That a copy of this Order be mailed to the attorneys for the parties.

/s/ Joseph H. Young
Senior United States
District Judge

APPENDIX B

Jury Selection – Voir Dire and Colloquy

* * *

[p. 23] accident. Settled out of court.

JUROR: 680, Deborah Cook. Automobile accident, settled out of court.

THE COURT: Thank you. Any others? Those of you who have had some prior experience in litigation matters, did anything occur in the course of that experience, or those experiences, that would in any way prejudice you for or against the plaintiff or the Defendants in this case or prevent you from returning a verdict solely upon the facts and the instructions on the law that I give you? I note no response.

I referred generally to the facts of this case, the near drowning incident that occurred at the Naval Academy swimming pool on September 12, 1989. Do any of you know anything about the facts of the case? Have you heard anything about it, read anything about it? Anybody ever talk to you about it? Do you know anything about the case? I note no response.

If you or one of the parties in the case, either the plaintiffs, the parents of the Midshipman or the Defendants, Dr. Lethbridge, or the Anne Arundel Medical Center, do you know of any reason you would not be content to have the case tried by someone in your present frame of mind? I note no response.

[p. 24] If you are selected to sit on this case, would you be unable or unwilling to render a verdict solely on the evidence that is presented at the trial and the law as I give it to you in the course of my instructions, disregarding any other ideas, notions or beliefs about the law that

you may have encountered, in reaching your verdict? I note no response.

It is anticipated this case, which will begin today with evidence, will go Wednesday, Thursday, Friday of this week and then into next week, Monday, Tuesday, Wednesday and it is anticipated that it will be concluded on Thursday of next week.

Do any of have you any personal plans, any obligations, any matters that would make it difficult or impossible for you to be in attendance during that period of time? Yes, sir.

JUROR: Number 448, Your Honor.

THE COURT: Um hum. You have some complications?

MR. KIMSEY: Yes, sir. I earn my living selling on commission, and it would be very difficult for me to miss that much work at one strike.

THE COURT: Maybe you could sell to your fellow jurors.

* * *

[p. 31] she has ever been a party to a malpractice lawsuit based upon her conduct where the corporation was involved, ever been a witness in a suit. I would like to know if she has seen any of the material with respect to tort reform which has been put forward by the insurance industry over the last few weeks.

THE COURT: You have your exception. Any others?

MR. MCCLELLAN: Yes, sir. In addition to that I would like to respectfully ask the Court to ask the panel in this particular case, the attorneys and the Plaintiffs are members of the black race. In this particular case the Defendant and counsel are members of the white race. We would respectfully request that the Court inquire specifically to determine whether or not anybody has a predisposition for or against black persons or for or against white persons involved in this lawsuit.

THE COURT: I think we covered that one. You have your exception.

MR. MCCLELLAN: Additionally, Juror Number 523, at this time I would respectfully request –

THE COURT: I will strike 523.

MR. MCCLELLAN: You will strike. Thank you. Additionally, Your Honor, the Plaintiffs request

* * *

APPENDIX C

Timeline Summary Chart

Excerpts from Appellant's Brief submitted to Court of Appeals

Excerpts from Trial Transcript

TIMELINE OF CARE

2:45

- Vital signs : pulse = 104, resp = 24, BP = 130/70
- transcribed into chart by Nurse Dyson at 3 p.m.
- Nurse Dyson's initial assessment: patient able to communicate verbally, wearing 10 liter non-rebreather mask; looked relatively well

3:00

- Nurse Dyson noted patient saying "I don't remember everything but I guess I blacked out"
- Assessment: Patient found under water, pulled with one minute submersion after becoming unresponsive
- Appears in mild respiratory distress with cough, reported hemoptysis

3:00

Shift change

- Nurse Dyson: Assumed patient responsibility, directed him to yellow four trauma room for the next 15 minutes
- Dr. Lethbridge started shift

3:05

- ER facesheet: 19 year-old black male swimming under water
- Seen by Dr. Halpern: swimming under water, loss of consciousness ?5-10 minutes, PE-VS referred to nurse's vital signs, noted bilateral rhonchi andrales, no other injuries
- Dr. Halpern ordered oxygen via nasal cannula, Proventil nebulizer:
ABG, CBC, SMA7, chest x-ray

2c

3:05-3:20

Dr. Lethbridge:
• observation of patient's condition
• continue with ordered tests

3:10

• CBC, SMA-7, ABG's drawn

3:20

• sent to radiology per Dr. Halpern's order, transported to radiology with nurse

3:30-3:35

• x-rays taken

3:40

• Dr. Lethbridge notes in chart: dragged out of pool, bloody frothy sputum; central chest pain • P/E 19 year old black male, frothy, bloody hemoptysis, not moving much air, some inspiratory wheezing

3:40

• Stat x-rays showed diffuse alveolar infiltrates of lower lobes
• Dr. Lethbridge ordered ET tube, Valium, Pavulon, Morphine, Lasix, normal saline
• Discussion with Dr. Bernstein
• Dr. Bernstein notes initial chest x-ray shows billateral process consistent with ARDS

3:40-4:00

• Patient put on 50% ventimask
• Dr. Lethbridge ordered ABG's repeated

3c

4:00

- Dr. Bernstein accepts care of patient

4:08

- vital signs: pulse = 88, resp = 38, BP = 130/80

4:08-4:15

- 5 mgs Valium given
- nasotracheal intubation
- patient received in heart room
- lethargic obtunded
- large amount bloody fluid expelled from lungs
- vomiting large amounts

4:15

- patient on controlled mechanical ventilation

4:20

- Dr. Lethbridge orders Valium

4:30

- Dr. Lethbridge orders morphine to reduce agitation

4:35

- portable chest x-rays show ET tube at G7, diffuse bilateral infiltrates note

4:40

- Dr. Lethbridge orders Pavulon to paralyze patient due to bucking the respirator

4:52

- Controlled mechanical ventilation

4c

4:55

- Suctioned often for large amounts of bloody fluid

5:00

- ICU received patient from ER

---

* * *

The inaccuracies, omissions and embellishments in the timeline of Care are many, and are summarized as follows:

1. The Timeline omits that the patient, Robert Barr, Jr., arrived at the Anne Arundel Medical Center Emergency Room at 2:29 p.m. *See* Plaintiffs' Exhibit #9 at p. 2; App. 417.

2. Nurse Dyson's entry at 3:00 p.m. is shown as a separate entry from when he saw the patient at 2:45 p.m. Nurse Dyson stated that he saw the patient at 2:45 p.m. and transcribed his findings at 3:00 p.m. *See* Neuman Tr. 2-24-96 at pp. 430; App. 421.

3. The second 3:00 p.m. entry is accurate only in that there was a shift change for the doctors and Dr. Lethbridge started her shift at this time. There is no evidence in the medical records or from testimony that Nurse Dyson assumed responsibility for the patient for the next 15 minutes. *See* Neuman Tr. 2-24-96 at pp. 430-431; App. 419.

4. The Timeline entry at 3:05 p.m. omits Dr. Halpern's note that the patient was alert. *See* Neuman Tr. 2-24-96 at pp. 435; App. 419. *See also* Plaintiffs' Exhibit #9 at p. 6; App. 421.

5. The entries listed between 3:05 p.m. and 3:20 p.m. (including the 3:10 p.m. and 3:20 p.m. separate entries) and the entry at 3:30-3:35 p.m. are not contained in the medical records or based on testimony. *See* Neuman Tr. 2-24-96 at pp. 435; App. 419, 421, 422.

6. The Timeline shows two separate entries of the care Dr. Lethbridge rendered at 3:40 p.m.

Dr. Neuman testified that these descriptions listed on the Timeline were "blatantly incorrect." Neuman Tr. 2-24-96 at pp. 449; App. 419. In addition, the x-ray report in the medical records has no time listed on it but it is inserted on the timeline at 3:40 p.m. *See* Plaintiffs' Exhibit #9 at p. 114; App. 443-444.

7. The entry between 3:40 p.m. and 4:00 p.m. is inaccurate as the medical records do not indicate that the patient was placed on a ventimask at this time. Further, there is no record that Dr. Lethbridge ordered ABGs repeated. *See* Neuman Tr. 2-24-96 at pp. 449-452. *See also* Plaintiffs' Exhibit #9 at pp. 6, 8, 10; App. 419, 422.

8. The 4:00 p.m. entry simply states that Dr. Bernstein accepts care of the patient. The Timeline omits that at that time Nurse Gilbert had indicated the patient was given the Lasix which was ordered at 3:40 p.m., his blood pressure was 140/90 and his respiratory distress was increasing. *See* Plaintiffs' Exhibit #9 at p. 8; App. 422.

9. The Timeline omits entries which are in the medical records which occurred before 4:08 p.m., when the intubation is in progress. In particular, the records reflect that a nurse wrote that the patient's respiratory rate is 44, and under comments he wrote that the patient is "hemoptysis, breaths labored and shallow, lung course bilat; buccal mucosa dusky; some areas of decreased breath sounds; pt. coughing frequently." The nurse had not checked any of the respiratory devices which include ET#, and consequently, this assessment was made prior to

the patient's intubation. *See* Plaintiffs' Exhibit #9 at p. 7; App. 421.

10. The chart omits all entries written at 4:05 p.m. in the medical records which indicate that Dr. Lethbridge administered 5 mgs. of Valium. In fact, this dosage of 5 mgs. is recorded on the Timeline of care at 4:08 p.m. *See* Plaintiffs' Exhibit #9 at p. 8; App. 422.

11. The Timeline includes a time frame of 4:08 p.m. to 4:15 p.m. In this summary, various notes at 4:08 p.m. made by the nurse are omitted. The nurse had noted that the patient is *markedly* lethargic with an arrow which represents an increase pointing towards the word obtunded. The nurse also noted that the patient is "vomiting *enormous* amount *partially digested food.*" *See* Plaintiffs' Exhibit #9 at p. 8; App. 422.

12. The Timeline entry at 4:30 p.m. says that Dr. Lethbridge's order of morphine sulphate was given to reduce agitation. This is an editorialization of Dr. Lethbridge's actions. The entry also omits that the patient was given 4 mg. of this dosage. *See* Plaintiffs' Exhibit #9 at p. 8; App. 422.

13. The 4:20 entry states only that Dr. Lethbridge ordered Valium, omitting that this dosage was 9 mg. *See* Plaintiffs' Exhibit #9 at p. 8; App. 422.

14. The Timeline notes that at 4:35 p.m., a chest x-ray is returned. It omits that the radiologist indicated the endotracheal tube is "at the edge of the film, with the tip at the C7 level. This is likely not well situated within

the trachea, and should be repositioned." *See* Plaintiffs' Exhibit #9 at p. 115; App. 444.

15. The 4:40 p.m. note on the Timeline also editorializes the reason for Dr. Lethbridge's order of Pavulon. It omits that the patient was given a dosage of 4 mg. *See* Plaintiffs' Exhibit #9 at p. 8; App. 422.

16. The chart omits that at 4:42 p.m. the patient is given an additional dosage of 2 mg. of Pavulon. *See* Plaintiffs' Exhibit #9 at p. 8; App. 422.

17. At 4:52 p.m., the chart has an entry for controlled mechanical ventilation. This is blatantly incorrect because there are no settings between 4:15 p.m. and 5:00 p.m. on the ventilator log. *See* Plaintiffs' Exhibit #9 at p. 20; App. 432.

18. The Timeline chart omits that at 4:55 p.m., the patient is given an additional 5 mg. of Valium and under the response section, the nurse has written a question sign. The nurse also notes that at 4:55 p.m. a NGT (nasogastric tube) was inserted. *See* Plaintiffs' Exhibit #9 at p. 8; App. 422.

19. At 5:00 p.m., the Timeline only states that the patient was received in the ICU. It omits that the patient was reintubated orally. *See* Plaintiffs' Exhibit #9; App. 433.

* * *

[p. 4] then towards the end of his testimony, while he was testifying regarding some testing that he had done, calculations rather would be a better term, he put those calculations with the dates of ABGs, et cetera, on Exhibit Number 23 but it was never admitted at that time.

THE COURT: Be admitted.

MR. WHARTON: Early in the case there was admitted for identification only defendant Lethbridge's Exhibit Number 13 which was a two document blow-up. If the Court please, we had offered the admission of this time line, Exhibit Number 13, under Federal Rule of Evidence 1006 on the basis –

THE COURT: Dr. Neuman's testimony?

MR. WHARTON: It was during Dr. Neuman's testimony, yes, Your Honor. He did testify that he did not agree with one or two entries on it. I will acknowledge that. But I think under Rule 1006 it is admissible as a compilation, subject to any criticism witnesses want to make of it when it is used to examine them.

MR. EATON: I object, Your Honor.

THE COURT: This was the time line, summary of the treatment provided?

MR. EATON: That's correct.

THE COURT: From 2:45 to 7:00 o'clock.

MR. EATON: That's correct. That time line we would object to because he has not met the requirements of Rule [p. 5] 1006. First of all, we had to receive it before the trial. We had to have the opportunity to examine it for

its accuracy. We needed the underlying documents. We believe this is not an accurate representation of the contents of the record. And even if it were admissible it would mislead the jury under Rule 403.

THE COURT: He has identified it as such. Whether it is or not, it is a matter for the jury to resolve. It will be admitted.

MR. WHARTON: Your Honor, finally, Exhibits 1, 2 and 3 are medical records which include the University of Maryland medical records and I have some uncertainty with reference to Number 2.

THE COURT: Two has been admitted.

MR. WHARTON: I just want to be able – I want to check because we didn't use it. But Defendant's 18 A, B, C, D, E and F, the X-rays, I believe they are admitted but I want to be sure. They are not admitted. So I would move in the X-rays that were identified during the course of the trial, particularly in Dr. Modell's testimony.

THE COURT: It's A through E, easy.

MR. WHARTON: I think it's A through F.

THE COURT: A through F. Be admitted.

MR. WHARTON: If the Court please, we also – contrary to what counsel said with regard to the time line,

* * *

Supreme Court, U.S.
F I L E D
OCT 2 1997
CLERK

No. 97-180

In The

Supreme Court of the United States

October Term, 1996

ROBERT L. BARR, SR., *et ux.*,

Petitioners,

vs.

ANNE ARUNDEL MEDICAL CENTER, INC.
and ROSEMARY LETHBRIDGE, M.D.,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

JAMES T. WHARTON
CHRISTIAN A. LODOWSKI
WHARTON, LEVIN,
EHRMANTRAUT, KLEIN
& NASH, P.A.
Attorneys for Respondent
Rosemary Lethbridge, M.D.
104 West Street
P.O. Box 551
Annapolis, Maryland 21401-0551
(410) 263-5900

KURT D. KARSTEN
Counsel of Record
COWDREY, THOMPSON
& KARSTEN, P.A.
Attorneys for Respondent
Anne Arundel Medical Center, Inc.
Ridgely Oaks Professional Center
621 Ridgely Avenue
Suite 402
Annapolis, Maryland 21401
(410) 841-1938

72135
(800) 3 APPEAL • (800) 5 APPEAL • (300) BRIEF 21
Lutz Appellate Services, Inc.

HOPP

QUESTIONS PRESENTED

In a medical malpractice case where each of the Respondents, including their attorneys, are white and each of the Petitioners, including their attorneys, are African-American, did the trial court abuse its discretion and/or deprive Petitioners of their rights to due process and equal protection, secured by the Fifth Amendment, and rights to freedom from badges and incidents of slavery, secured by the Thirteenth Amendment, when the court asked several questions on voir dire regarding prospective juror's ability to render a fair and impartial verdict, but precluded Petitioners from asking one specific question on voir dire as to whether prospective jurors would not be fair to the parties because of their race?

Did the trial court abuse its discretion and/or violate the Petitioner's rights to due process and equal protection, secured by the Fifth and Thirteenth Amendments, when it did not, *sua sponte,* conduct a *Batson* inquiry following Petitioners' conscious decision not to raise such a challenge?

Did the trial court abuse its discretion in admitting in evidence pursuant to Federal Rules of Evidence 1006, a compilation derived from voluminous medical records, the contents of which were combined in the medical records in evidence and supported by testimony given by witnesses at the time of the trial?

CORPORATE DISCLOSURE STATEMENT

Anne Arundel Medical Center, Inc., is a wholly owned subsidiary of the parent company Anne Arundel Health Systems, Inc., a private non-profit Maryland Corporation. There are no subsidiary corporations owned by Anne Arundel Medical Center, Inc.

TABLE OF CONTENTS

	Page
Questions Presented	i
Corporate Disclosure Statement	ii
Table of Contents	iii
Table of Citations	v
Opinions Below	1
Statement of Jurisdiction	1
Constitutional Provisions, Statutes and Rules Involved	1
Statement of the Case	2
A. The Petitioners Misrepresent the Allegations, Pleadings and Issues Before the Jury and the District Court Relative to the Claim of Error in the Granting of Peremptory Challenges.	2
B. The Petitioners Misrepresent the Record of the Case in Contending That the Respondents Used Their Four Peremptory Challenges to Strike Four African American Women.	6
C. The Petition Is Misleading in That it Fails to Identify All of the Relevant Voir Dire Questions Posed to the Prospective Jurors Regarding Their Ability to Render a Fair And Impartial Verdict.	7

Contents

Page

D. Petitioners Misrepresent, in Several Respects, the Facts and Record Regarding the "Timeline." 8

Reasons for Denying the Writ 10

I. Inquiries Regarding Potential Juror Racial Biases Are Properly Addressed Through Generalized Voir Dire Questions Absent the Existence of Circumstances Indicating a Reasonable Possibility That Racial Prejudice Will Influence the Jury's Verdict. 11

II. Trial Courts Administer a Variety of Safeguards to Ensure a Jury Selection Process That Is Free From Biases of Any Sort And The Actions of The Trial Court Below in Administering These Safeguards Do Not Constitute an Abuse of Discretion. 17

III. The Trial Court Did Not Abuse Its Discretion In Admitting The "Timeline Of Care" And The Decision Of The Court Of Appeals To Affirm The Judgment In This Case Is Not In Conflict With The Pertinent Decisions Of Other Courts Of Appeals And, Therefore, Does Not Require Review On Certiorari. 24

Conclusion 30

Contents

Page

TABLE OF CITATIONS

Cases Cited:

Batson v. Kentucky, 476 U.S. 79, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986) ..... i, 12, 14, 17, 21, 22, 23

Clark v. Newport News Shipping & Dry Dock Co., 937 F.2d 934 (4th Cir. 1991) 22

Dawson v. Wal-Mart Stores, Inc., 978 F.2d 205 (5th Cir. 1992) 22

Edmonson v. Leesville Concrete Co., Inc., 500 U.S. 614, 111 S. Ct. 2077, 114 L. Ed. 2d 660 (1991) 14, 22

Fedorchick v. Massey-Ferguson. Inc., 577 F.2d 856 (3d Cir. 1978) 18

Goldstein v. Kelleher, 728 F.2d 32 (1st Cir. 1984), *cert. den.*, 469 U.S. 852 (1984) 20, 21, 22

J.E.B. v. Alabama ex. rel. T.B., 511 U.S. 127, 114 S. Ct. 1419, 128 L. Ed. 2d 89 (1994) 22

Nehring v. Empresa Lineas Maritimas Agentinas, 401 F. 2d 767 (5th Cir. 1968), *cert. den.*, 396 U.S. 819, 90 S. Ct. 55, 22 L. Ed. 2d 69 (1969) 19

Ristaino v. Ross, 424 U.S. 589, 96 S. Ct. 1017, 47 L. Ed. 2d 258 (1976) 12, 13, 14, 16, 17

Contents

Page

Rosales-Lopez v. United States, 451 U.S. 182, 101 S. Ct. 1629, 68 L. Ed. 2d 22 (1981) 12, 14, 16, 17

Smith v. Pressed Steel Tank Co., 66 F.R.D. 429 (E.D. Pa. 1975), *aff'd.*, 524 F.2d 1404 (1975) 19

Standard Industries v. Mobil Oil Corp., 475 F.2d 220 (10th Cir. 1973) 19

United States v. Anderson, 562 F.2d 394 (6th Cir. 1977) 18

United States v. Barber, 80 F.3d 964 (4th Cir. 1996) 13, 14, 15, 16

United States v. Blanton, 700 F.2d 298 (6th Cir.), *rev'd on other grounds*, 719 F.2d 815 (6th Cir. 1983) (en banc), *cert. den.*, 465 U.S. 1099, 104 S. Ct. 1592, 80 L. Ed. 2d 125 (1984) 18

United States v. Brown, 767 F.2d 1078 (4th Cir. 1985) 13

United States v. Caswell, 825 F.2d 1228 (8th Cir. 1987) 26

United States v. Citron, 783 F.2d 307 (2d Cir. 1986) .. 27, 28

United States v. Conlin, 551 F.2d 534 (2d Cir. 1977), *cert. denied*, 434 U.S. 831, 98 S. Ct. 114, 54 L. Ed. 2d 91 (1977) 27, 28

Contents

	Page
United States v. Eagle Thunder, 873 F. Supp. 1362 (D. S.D.), *aff'd,* 51 F.3d 278 (8th Cir. 1994), *cert. den.,* 514 U.S. 1076, 115 S. Ct. 1721, 131 L. Ed. 2d 580 (1995)	13
United States v. Foley, 598 F.2d 1323 (4th Cir.), *cert.den.,* 444 U.S. 1043, 100 S. Ct. 727, 62 L. Ed. 2d 728 (1979)	25
United States v. Stephens, 779 F.2d 232 (5th Cir. 1985)	26
United States v. Strissel, 920 F.2d 1162 (4th Cir. 1990)	25
United States v. Washington, 48 F.3d 73 (2d Cir.1995), *cert. den.,* 515 U.S. 1151, 115 S. Ct. 2596, 132 L. Ed. 2d 843 (1995)	13
United States v. Winn, 948 F.2d 145, 158 (5th Cir. 1991), *cert. denied,* 503 U.S. 976, 112 S. Ct. 1599, 118 L. Ed. 2d 313 (1992)	26
United States v. Wood, 943 F.2d 1048 (9th Cir. 1991)	27, 28, 29

Statutes Cited:

28 U.S.C. § 1870	1, 6, 18, 19
36 C.J.S. § 204(2)	11

Contents

Page

United States Constitution Cited:

Fifth Amendment ..... i, 6, 11

Thirteenth Amendment ..... i, 11

Rules Cited:

Federal Rules of Evidence Rule 1006 ..... i, 24, 25, 26, 28

Local Rule 36(c) 29

Supreme Court Rule 10 ..... 10, 29

Supreme Court Rule 15.1 2

Other Authorities Cited:

J. Weinstein & M. Berger, *Weinstein's Evidence* ¶1006[04] at 1006-8 (1975) 25

M. Graham, *Federal Practice and Procedure: Federal Rules of Evidence*, Sec. 7031 (1997 Pocket Part) ... 29

OPINIONS BELOW

The Memorandum Opinion of the United States Court of Appeals for the Fourth Circuit and the Order of Judgment and Order Denying Plaintiffs' Motion for New Trial by the United States District Court for the District of Maryland appear in Petitioners' petition.

STATEMENT OF JURISDICTION

Respondents agree with Petitioners' statement of the basis for jurisdiction in the Supreme Court as described in the Petition (*See*, Petition, p. 2).

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES INVOLVED

Respondents agree with Petitioners' statement of Constitutional provisions involved in the case as described in the Petition (*See* Petition, pp. 3-4).

Respondents agree with Petitioners' statement of the statutes and rules involved in the case as described in the Petition (*See* Petition, pp. 5-6) with the following addition(s):

28 U.S.C. § 1870: Challenges

> In civil cases, each party shall be entitled to three peremptory challenges. Several defendants or several plaintiffs may be considered as a single party for the purposes of making challenges, or the court may allow additional peremptory challenges and permit them to be exercised separately or jointly. All challenges for cause or favor, whether to the

array or panel or the individual jurors, shall be determined by the court.

STATEMENT OF THE CASE

The Petitioners, Robert Barr, Sr. and Catherine Barr, instituted Wrongful Death and Survival actions, pursuant to Maryland state law, against the Respondents, Anne Arundel Medical Center (hereinafter "AAMC") and Rosemary Lethbridge, M.D., for the death of their son, Robert Barr, Jr. The Complaint alleged that Robert Barr, Jr. died on September 25, 1989 due to the negligent medical care rendered by the Respondents on September 12, 1989 following Barr's near drowning incident. Trial commenced in the United States District Court for the District of Maryland on February 20, 1996 and the jury rendered its verdict in favor of the Respondents on March 1, 1996. Petitioners now seek review on certiorari by this Court of the opinion of the United States Court of Appeals for the Fourth Circuit affirming the jury verdict and judgment in favor of the Respondents. As is set forth in the succeeding section, there exists no cause for review on certiorari of the Fourth Circuit's opinion in this matter.

Pursuant to the mandates of Rule 15.1 of the Rules of the Supreme Court of the United States, Respondents herein identify several misstatements of fact made by the Petitioners within their Petition for Writ of Certiorari.

A. The Petitioners Misrepresent the Allegations, Pleadings and Issues Before the Jury and the District Court Relative to the Claim of Error in the Granting of Peremptory Challenges.

The Petitioners assert in their Statement of the Case that "[t]he court erred in granting the Respondents 4 peremptory

challenges while granting Petitioners only 3 peremptory challenges where the Respondents were presenting a joint defense and no cross claims were filed." (*See* Petition, p. 7). A review of the pleadings demonstrates a patent misrepresentation that the Petitioners' claims against the Respondents were the same.

Petitioners asserted individual and independent causes of action against each of the Respondents. In substance, the claims of negligence asserted against Rosemary Lethbridge, M.D. in Petitioners' Complaint were:

(a) Had a duty to, but failed to possess that degree of skill and knowledge to properly monitor the decedent's physical condition prior to conducting the nasotracheal intubation of the decedent;

(b) Had a duty to, but failed to properly treat Robert L. Barr, Jr.'s medical problems, in light of the fact that the [sic] had begun to expel large amounts of bloody fluid and partially digested food during the nasotracheal intubation procedure;

(c) Had a duty to, but failed to have and follow established emergency protocol for the treatment of person who are endotracheally intubated, one of whom was the decedent;

(d) Had a duty to, but failed to initiate preliminary testing of the decedent's physical condition, specifically after the sedation of the decedent with Valium and Morphine, prior to commencing the nasotracheal intubation procedure;

(e) Had a duty to, but failed to commence the nasotracheal

intubation while the decedent was coherent, and not in an adequately sedated state;

(f) Had a duty to, but failed to ensure that the initial dose of Valium was sufficient to complete the nasotracheal intubation procedure;

(g) Had a duty to, but failed to act in a timely manner to attempt to ensure that the stomach contents were emptied prior to beginning the intubation procedure;

(h) Had a duty to, but failed to provide proper medication to the decedent prior to the nasotracheal intubation procedure which would not severely and dangerously reduce decedent's gag reflex;

(i) Had a duty to, but failed to provide adequate sedation so that decedent would not vomit during the nasotracheal intubation procedure; and

(j) Had a duty to, but failed to delay the paralyzation with Pavulon of the decedent for forty (40) minutes after the sedation of the decedent with Valium, which severely and dangerously reduced the gag response of the decedent.

The claims of negligence made against Anne Arundel Medical Center in Petitioners' Complaint were:

(a) Had a duty to, but failed to posses that degree of skill and knowledge necessary to properly treat an individual suffering from the effects of a near drowning experience;

(b) Had a duty to, but failed to treat Robert L. Barr, Jr.'s medical problems in a timely manner;

(c) Had a duty to, but failed to have and to follow established protocol for the treatment of persons experiencing a near drowning condition compounded by an unstable respiratory state;

(d) Had a duty to, but failed to have and to follow established policies and procedures for the treatment of persons experiencing the effects of a near drowning;

(e) Had a duty to, but failed to properly carry out and monitor the nasotracheal intubation of the decedent;

(f) Had a duty to, but failed to diagnose, assess and treat hypoxemia;

(g) Had a duty to, but failed to acquire proper and necessary consultations by medical specialists;

(h) Had a duty to, but failed to conduct adequate and appropriate tests to identify the source of decedent's fever and/or infection;

(i) Had a duty to, but failed to properly educate Emergency Room and ICU medical care team members regarding proper diagnosis and treatment of the near drowning victim;

(j) Had a duty to, but failed to properly triage and prioritize the care of the decedent in the Emergency Room; and

(k) Had a duty to, but failed to properly prioritize the care of the ICU patients; and

(l) Had a duty to, but failed to timely transfer the decedent

> to a tertiary care medical facility capable of providing care for his complex medical problems.

Simply put, the Petitioners' assertion in their Statement of the Case that "the Respondents were presenting a joint defense" patently misrepresents the fact that the Respondents were defending themselves against separate and distinct claims. As is argued subsequently, given this circumstance, the trial court properly concluded that the Respondents had different interests and, thereafter, exercised its discretion in accordance with 28 U.S.C. § 1870.

B. The Petitioners Misrepresent the Record of the Case in Contending That the Respondents Used Their Four Peremptory Challenges to Strike Four African American Women.

The Petitioners assert in their Statement of the Case that "[t]he Respondents used their four peremptory challenges to strike four African American women on the basis of their race, in violation of the rights of Petitioners and prospective jurors to Equal Protection and Due Process as guaranteed by the Fifth and Fourteenth Amendments of the United States Constitution." (*See* Petition, pp. 7, 21)

As is detailed subsequently, there is absolutely no record in this case to support the Petitioners' contention that the Respondents used their four peremptory challenges to strike four African American women on the basis of their race. In fact, a review of the venire list, the only record available relative to this issue, reveals that there were not four women available to strike.

C. The Petition Is Misleading in That it Fails to Identify All of the Relevant Voir Dire Questions Posed to the Prospective Jurors Regarding Their Ability to Render a Fair And Impartial Verdict.

In discussing the efforts of the trial court during voir dire questioning, Petitioners misleadingly state that the "closest the trial court came to inquiring about racial bias were two general and abstract questions: . . ." . (*See* Petition, p. 14). Petitioners patently omit the Court's voir dire, *inter alia*, and the colloquy that immediately followed:

> THE COURT: Can you think of any other matter that you should call to the Court's attention which may have some bearing upon your qualifications as a juror in this case or which may prevent you from rendering a fair and impartial verdict based solely upon the evidence and my instructions on the law? I note no response.
>
> * * *
>
> MR. McCLELLAN: [I]n addition to that I would like to respectfully ask the Court to ask the panel in this particular case, the attorneys and the Plaintiffs are member of the back (sic) race. In this particular case, the Defendant and counsel are members of the white race. We would respectfully request that the Court inquire specifically to determine whether or not anybody has a predisposition for or against black persons or for or against white persons involved in this lawsuit.

> THE COURT: I think we covered that one. You have your exception.

At this stage of the trial, simple observation made it obvious that the Petitioners and their counsel were African American and that the Respondents and their counsel were Caucasian. As is detailed in the succeeding section, it is well settled case law that the trial judge's immediate perception and own evaluations of demeanor evidence and of responses to questions determine the scope of the questions to be asked. Moreover, in the absence of a racial issue intertwined within the conduct of the trial, to ask a specific voir dire question concerning racial prejudice may well serve to inject race into the trial and thereby create the risk of injustice by suggesting that, even though race is not an issue, justice nonetheless turns upon skin color.

D. Petitioners Misrepresent, in Several Respects, the Facts and Record Regarding the "Timeline."

Petitioners allege that the "Timeline" (a summary chart detailing the medical care rendered to Robert Barr, Jr) "contained numerous inaccuracies, material omissions, and editorial comments" and "was never produced by defense counsel for examination prior to trial and Respondents failed to lay any foundation for its admission, either by way of explaining how its contents were derived from source documents or from testimonial sponsorship." (*See* Petition, pp. 25-6). Petitioners' allegations misrepresent the facts in several respects.

First, Petitioners were provided a copy of the "Timeline" as early as two weeks prior to trial. Petitioners' counsel, Lavern Wiley, accompanied by paralegal Sheri-Ann Cowie, by scheduled appointment came to Dr. Lethbridge's counsels' office, in an effort, pursuant to the Federal Rules, to exchange trial exhibits and documents. Counsel for AAMC also attended

the meeting, during which time counsel for the Petitioners were provided with a copy of the "Timeline."

Second, an objective foundation for the Timeline was contained within the medical records and fully supported by witness testimony. Petitioners had the opportunity to cross-examine all of the witnesses at trial regarding any alleged inaccuracies within the "Timeline". Moreover, Petitioners themselves prepared and introduced typed summaries of certain notations extracted from the medical records which, taken together, were nearly identical to the "Timeline".

Trial testimony offered in conjunction with and objectively supporting the "Timeline" consisted of the following:

1. 3:00 — shift change (Dr. Lethbridge, pg. 5).

2. 3:00 — Nurse Dyson assessment (Dyson pgs. 80 & 93).

3. 2:45 — vital sign recorded (Dyson pgs. 78 & 92).

4. 2:45 — wearing 10 liter non-rebreather mask (Dyson pg. 79).

5. 3:00 — directed to specific trauma room (yellow four) (Dyson pgs. 82 & 95).

6. 3:05 — seen by Dr. Halpern, history obtained and tests ordered (Halpern Pgs. 96, 261-262, 264-266).

7. 3:20 — transport to x-ray with nurse (Gilbert Pg. 117).

8. 3:40 - 4:00 — placed on 50% ventimask (Bernstein Pgs. 245-246).

9. 4:00 — Dr. Bernstein accepts care of patient (Gilbert Pg. 103).

10. 4:08 — vital signs at 16:08 (Gilbert Pg. 110).

11. 4:08 — respiratory rate (Gilbert Pg. 114).

12. 4:08 — Valium given (Lethbridge Pgs. 59 & 61).

13. 4:20 — Dr. Lethbridge orders Valium and Morphine (Lethbridge Pgs. 61-62).

14. 4:35 — portable x-ray displays diffuse bilateral infiltrates (Bernstein Pg. 238).

15. 4:40 — bucking the ventilator (Larsen Pg. 943).

From a review of this trial testimony, it is clear, despite Petitioners' assertion to the contrary, that the "Timeline" was indeed an accurate and objective presentation of the facts as they appeared in the medical records. Therefore, as is discussed subsequently, the admission of the "Timeline" was not an abuse of discretion.

REASONS FOR DENYING THE WRIT

The Petitioners' claims that the court below erred do not warrant review by this Court. As this Court is acutely aware, the jurisdiction of the Supreme Court to review judgments or decrees of the courts of appeals by certiorari is guided by the considerations set forth in Rule 10 of the Rules of the Supreme Court of the United States and is "a jurisdiction to be exercised entirely in the discretion of the court, and the court will ordinarily grant the writ sparingly, and only in extraordinary cases of peculiar gravity and general importance, or in order to secure

uniformity of decision." 36 C.J.S. § 204(2). As is set forth below, each of the three bases upon which Petitioners seek granting of the Writ of Certiorari fails to rise to the level necessary to justify review by this Court.

I.

INQUIRIES REGARDING POTENTIAL JUROR RACIAL BIASES ARE PROPERLY ADDRESSED THROUGH GENERALIZED VOIR DIRE QUESTIONS ABSENT THE EXISTENCE OF CIRCUMSTANCES INDICATING A REASONABLE POSSIBILITY THAT RACIAL PREJUDICE WILL INFLUENCE THE JURY'S VERDICT.

Racial prejudice in the context of the courtroom is of considerable and long-standing concern. As such, the issue has garnered considerable judicial attention and an extensive body of law has developed. In the Petition for Writ of Certiorari, the Petitioners contend that, in the case at bar, the trial court's exercise of its discretionary power to preclude, during the conduct of voir dire, any specific inquiry regarding racial bias amounted to an abuse of the court's discretion and/or a deprivation of the Petitioners' Fifth and Thirteenth Amendment rights (*See*, Petition, p. 19). In essence, the Petitioners contend that the conduct of a fair trial by an impartial jury requires specific voir dire inquiries regarding racial bias, regardless of the circumstances of the case at hand. Such contentions are unpersuasive, being unsupported by pertinent case law, sound reasoning, and the record of this case.

The influence of racial biases on the civil litigation process has been addressed both with respect to the exercise of peremptory challenges and the potential for juror biases to effect jury verdicts. In order to eliminate racially motivated jury

verdicts, the courts, pursuant to *Batson v. Kentucky*, 476 U.S. 79, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986) and its progeny has delineated procedural methods aimed at uncovering bias in the exercise of peremptory challenges, as is discussed in greater detail in the succeeding section. In addition, the courts have indicated that, under certain limited circumstances, specific voir dire questions aimed at uncovering prospective juror biases are appropriate despite the risks associated with injection of the issue of race into the trial. However, the case at hand clearly does not pose the type of situation which necessitates specific voir dire questions regarding racial bias. Accordingly, the trial court, acting *sua sponte*, properly excluded petitioners' proposed question of this nature and adequately addressed the question of bias during voir dire.

The issue of when voir dire questions specifically concerning racial bias should be asked has been the subject of much discussion by courts of all levels in the criminal law context. However, Petitioners have neither located nor cited any authority for the proposition that specific voir dire questions regarding racial attitudes or biases may be mandated in a civil action.

Significantly, even within the criminal law context, a defendant is only entitled to pose voir dire questions concerning racial bias upon establishing: (1) that there exists special circumstances giving rise to the "reasonable possibility" that the jury's verdict may be influenced by racial or ethnic prejudice, *Rosales-Lopez v. United States*, 451 U.S. 182, 191, 101 S. Ct. 1629, 1635, 68 L. Ed. 2d 22 (1981); or (2) where a violent crime has occurred involving members of different racial or ethnic groups. *Rosales-Lopez*, 451 U.S. at 192. Special circumstances may be found whereby racial issues are "inextricably bound up with the conduct of the trial" requiring specific voir dire questions on racial prejudice. *Ristaino v. Ross*, 424 U.S. 589,

597, 96 S. Ct. 1017, 47 L. Ed. 2d 258 (1976). Only a general inquiry regarding prejudice will suffice where there is no racial dimension to the alleged crime, the charges brought, or the evidence to be presented. *United States v. Washington,* 48 F.3d 73, 78 (2d Cir.1995), *cert. den.*, 515 U.S. 1151, 115 S. Ct. 2596, 132 L. Ed. 2d 843 (1995). Even where a defendant is tried in a State where there exists a "climate of racial prejudice", in the absence of "special circumstances" there need be no specific voir dire question concerning racial prejudice. *United States v. Eagle Thunder,* 873 F. Supp. 1362, 1385 (D. S.D.), *aff'd,* 51 F.3d 278 (8th Cir. 1994), *cert. den.,* 514 U.S. 1076, 115 S. Ct. 1721, 131 L. Ed. 2d 580 (1995). In the absence of a showing of special circumstances indicating a "reasonable possibility" of racial prejudice affecting the jury the trial court does not abuse its discretion in denying a request for a specific question. *United States v. Brown,* 767 F.2d 1078, 1083 (4th Cir. 1985).

Recently, the Fourth Circuit visited this issue in *United States v. Barber,* 80 F.3d 964 (4th Cir. 1996). In this criminal matter the defendants, a married couple consisting of an African American husband and a Caucasian wife, were charged with drug-related money laundering. The district court declined to ask a voir dire question concerning jurors' attitudes towards interracial marriages. The United States Court of Appeals for the Fourth Circuit affirmed that decision, and in reiterating the applicable abuse of discretion standard, held that ". . . [W]e may find an abuse of discretion in a federal court's refusal to ask prospective jurors about racial prejudice only when: (1) such a request has been made; and (2) there is a 'reasonable possibility' that racial prejudice might influence the jury." *Barber,* 80 F.3d at 968. The court, sitting *en banc*, held that the mere fact that the defendants were married and were members of different races did not imply that racial issues were "inextricably bound up with the conduct of the trial." *Id.* The *Barber* defendants failed to establish the "reasonable possibility" that racial prejudice

would influence the jury by asking a voir dire question admittedly proposed only to "clear the air" on the "nonissue" of race. *Id.* The Court wisely concluded that, in the absence of a racial issue intertwined within the conduct of the trial, to ask a voir dire question concerning racial prejudice would only serve to inject race into the trial and would create the risk of injustice by suggesting that even though race is not an issue, justice nonetheless turns upon skin color. *Barber,* 969 (*citing to Ristaino, supra*).

Thus, despite Petitioners assertions that a "don't mention race" approach serves to deny litigants of a fair trial by an impartial jury, it is clear that the Supreme Court, and other courts at a variety of levels, has considered the issue in a criminal context wherein the potential loss of a defendant's liberty may indeed require a higher level of scrutiny, and has reached a different conclusion. Specific voir dire questions concerning racial prejudice are only necessary where there exists circumstances indicating a "reasonable possibility" that the jury's verdict may be influenced by racial prejudice.

The Petitioners reliance upon language contained in the Supreme Court's ruling in *Edmonson v. Leesville Concrete Co., Inc.*, 500 U.S. 614, 111 S. Ct. 2077, 114 L. Ed. 2d 660 (1991) is unpersuasive. In the *Edmonson* matter, this Court extended the use of *Batson* challenges to civil actions. The Petitioners rely upon an observation by the majority that the issue of juror bias "can be explored in a rational way that consists with respect for the dignity of persons, without the use of classifications based on ancestry or skin color." *Id.* at 631. Petitioners assert that this "admonition" requires the asking of specific voir dire questions regarding racial bias. Such an assertion blatantly disregards this Court's holding in *Rosales-Lopez* regarding the requirement that there exists circumstances pointing to a "reasonable possibility" of racial influence in the jury verdict and, in reality, asks this

Court to assume the existence of racial biases among the prospective jurors and to thereby abandon the "reasonable possibility" standard. This Court has wisely chosen a different approach to the issue, thereby minimizing the likelihood that jurors will come to believe that, even though race is not an issue in a given case, justice nonetheless turns upon skin color, a circumstance that might well result from the wholesale injection of race into a trial regardless of any indication of juror bias. Indeed, the very circumstances of the case at bar provide an excellent example of why this Court's approach is the correct one.

In this case, the mere fact that the Petitioners and their counsel were African-American, while respondents and their counsel were Caucasian, is insufficient to assume that racial biases exist among the prospective jurors and that such biases would serve to result in an unfair trial for the Petitioners. Race played no role in the conduct of the trial. To understand this, one need only take the time to read the trial transcript in its entirety — if the reader had no previous knowledge of the identity of the parties, he or she would be unable to discern the races of the individuals involved. Not one witness, either layperson or expert, alludes to race or implies through his or her testimony that race was ever an issue in this matter. Nor does an examination of the Complaint reveal any racial dimension whatsoever to the issues determined at trial. Furthermore, the Petitioners acknowledged below, in their Memorandum of Law in Support of Plaintiffs' Motion for New Trial, that they "have no specific evidence to support any allegation that the verdict rendered by the jury was affected by racial bias of any member"

Thus, it becomes apparent here, as in *Barber*, that Petitioners' proposed voir dire question was nothing more than an effort to "clear the air" on the nonissue of race. As the *Barber*

court wisely recognized, this sort of voir dire question not only does not give rise to a "reasonable possibility" that the jury verdict may be tainted by racial bias, but it creates the substantial risk of creating an issue of race where none had heretofore existed. The trial judge, relying upon well settled case law, as detailed in *Barber*, 80 F.3d at 967, and acting upon his "immediate perception" and "own evaluations of demeanor evidence and of responses to question", concluded that race was not an issue in this civil action. He, therefore, chose a proper, neutral approach and declined Petitioners' proposed question and inquired generally into prospective jurors potential biases.

The instructions of the Supreme Court in *Rosales-Lopez* and *Ristaino*, and their progeny, deftly balance the need to address the issue of potential juror bias with the risk of the creation of a racial "issue" through unwarranted inquiry of prospective jurors. Thus, despite Petitioners' assertions to the contrary, the well-reasoned, long-standing approach of this Court, and others at various levels, most adeptly serves the goal of affording litigants a fair trial by an impartial jury. For the preceding reasons, it is clear that the trial court did not abuse its discretion and/or deprive the Petitioners of their Constitutional rights when it denied Petitioners' request to pose a specific question on racial biases to the prospective jurors. Accordingly, the review of this issue on a writ of certiorari is not warranted.

II.

TRIAL COURTS ADMINISTER A VARIETY OF SAFEGUARDS TO ENSURE A JURY SELECTION PROCESS THAT IS FREE FROM BIASES OF ANY SORT AND THE ACTIONS OF THE TRIAL COURT BELOW IN ADMINISTERING THESE SAFEGUARDS DO NOT CONSTITUTE AN ABUSE OF DISCRETION.

There exist numerous safeguards within the jury selection process which seek to ensure that the selection of jurors and the rendering of jury verdicts are free from the influence of racial bias. *Batson v. Kentucky*, *supra*, and its progeny, addresses the potential for biases held by participating counsel to impact the judicial process by permitting parties to challenge perceived race-based peremptory challenges by an opponent. Similarly, the possibility of juror racial biases tainting jury verdicts is addressed through voir dire inquiry in a generalized manner absent the existence of circumstances indicating a reasonable possibility that racial prejudice will influence the jury's verdict. As detailed in the preceding section, the Supreme Court's holdings in *Rosales-Lopez* and *Ristaino*, and their progeny, make clear the delicate balance that must be struck between the need to address the issue of potential juror bias and the risk of the creation of a racial "issue" through unwarranted inquiry of prospective jurors. Petitioners now assert that the safeguards set forth in the pertinent opinions of this Court and others are insufficient and that trial courts should have an "independent duty" to protect the rights of litigants and prospective jurors from racial discrimination in the jury selection process. In support of their assertion of a need for an "independent duty", Petitioners contend that three actions occurring in the trial court below compromised Petitioners' ability to present their case on a level playing field. This contention, unsupported by any cited case law, is without merit, and it disregards the existing judicial

safeguards which squarely confront the concerns that Petitioners seek to address.

Furthermore, Petitioners' references to the approach of the trial court below as being flawed represent an effort to conduct an "end around" the reality that the trial court's efforts in this matter effectuated the safeguards and do not amount to an abuse of discretion. Accordingly, as with the previous assertion regarding the adequacy of the trial court's approach to voir dire questioning, Petitioners have failed to demonstrate that this issue amounts to an extraordinary case of peculiar gravity and general importance so as to warrant review on certiorari.

Petitioners first allegation in support of their assertion pertains to the trial court's granting of four peremptory challenges to the Respondents while limiting the Petitioners to three such challenges. It is difficult to perceive how this discretionary action of the trial court, performed in accordance with the terms of 28 U.S.C. § 1870 and applicable case law, supports, in any manner, Petitioners' assertion.

Pursuant to 28 U.S.C. § 1870, where there are multiple defendants, "the court may allow additional peremptory challenges and permit them to be exercised separately or jointly." By its very terms, "the statute permits the trial judge to allocate more than three peremptory challenges when more than one plaintiff or defendant is present in a case", *Fedorchick v. Massey-Ferguson. Inc.*, 577 F.2d 856, 858 (3d Cir. 1978). The manner in which peremptory challenges are exercised is a matter of local custom and traditionally has been left to the sound discretion of the district court. *United States v. Blanton*, 700 F.2d 298, 308-309 (6th Cir.), *rev'd on other grounds*, 719 F.2d 815 (6th Cir. 1983) (en banc), *cert. den.*, 465 U.S. 1099, 104 S. Ct. 1592, 80 L. Ed. 2d 125 (1984); *United States v. Anderson*, 562 F.2d 394, 396-97 (6th Cir. 1977). The trial judge has discretion as to the

number of peremptory challenges. 28 U.S.C. § 1870; *Smith v. Pressed Steel Tank Co.*, 66 F.R.D. 429 (E.D. Pa. 1975), *aff'd.*, 524 F.2d 1404 (1975), and "[i]n reviewing the trial judge's allocation of peremptory challenges in a multi-party civil case, our standard of review is whether the trial judge abused his discretion". *Id. See also Nehring v. Empresa Lineas Maritimas Agentinas*, 401 F. 2d 767, 768 (5th Cir. 1968), *cert. den.*, 396 U.S. 819, 90 S. Ct. 55, 22 L. Ed. 2d 69 (1969). "The use of the word 'may' in the statute confers judicial discretion on the trial court". *Standard Industries v. Mobil Oil Corp.*, 475 F.2d 220, 225 (10th Cir. 1973).

As previously detailed in Respondents' Statement of the Case, the trial court below, *sub judice*, specifically addressed the number of peremptory challenges to be allocated, concluding that the Respondents had different interests and then instructing the Respondent defendants to not corroborate with regard to peremptory challenges.

The trial court did not abuse its discretion in allocating Petitioners three peremptory challenges as opposed to the four allocated to the Respondents given the fact that the Respondents had obviously distinguishable interests. Dr. Lethbridge and AAMC were each represented by separately retained counsel, and moreover, there was no stipulation that a verdict against Dr. Lethbridge would likewise apply against AAMC. Furthermore, a cursory examination of the Petitioners' Complaint reveals that they asserted many separate and distinct, albeit unproven, counts of direct negligence against Respondent AAMC. Beyond this, Respondents clearly distinguished their interests by the fact that they formulated and conducted their own discovery and separately retained expert witnesses on their respective behalf. Given the obvious distinguishable interests between the Respondents, the trial court's granting of four peremptory challenges clearly does not constitute an abuse of discretion.

See Goldstein v. Kelleher, 728 F.2d 32, 37 (1st Cir. 1984), *cert. den.*, 469 U.S. 852 (1984) (wherein the court held that if each defendant has "even colorably different interests from the other" the granting of additional peremptory challenges will not be questioned).

Petitioners' second point in support of the need for an "independent duty" pertains to the trial court's refusal to ask a specific voir dire question regarding prospective jurors' racial biases, a matter which has been thoroughly briefed in the preceding section. Under the circumstances of this particular action, *i.e.*, where there existed no racial dimension to the issues at trial, and the sole racial "issue" at trial was the fact that Petitioners and their counsel were African American while Respondents and their counsel were Caucasian, the trial court properly and adequately addressed the potential for juror racial biases with several inquiries including the question:

> Can you think of any other matter that you should call to the Court's attention which may have some bearing upon your qualification as a juror in this case or which may prevent you from rendering a fair and impartial verdict based solely upon the evidence and my instructions on the law? I note no response.

The trial court's actions relative to this issue do not amount to an abuse of discretion. Moreover, Petitioners have failed to show how the trial court's adherence to the applicable holdings of the Supreme Court and other courts as to this issue is insufficient to protect the rights of citizens and litigants to participate in a jury selection process free of racial biases.

Finally, Petitioners' most specious assertion in support of

their call for an "independent duty" is their claim that the trial judge witnessed the Respondents' use of all four of their peremptory challenges to strike four African American women without taking action. As noted in Respondents' Statement of the Case, Petitioners' assertion is a blatant misrepresentation of the facts in this case. Accordingly, the assertion is without merit, initially for the reason that it is not true, but, moreover, even assuming that it were true, Petitioners' failed to preserve their objection by consciously waiving a *Batson* challenge at the time of jury selection.

Petitioners' assertion is made without any record support whatsoever. "Counsel's representation is not an adequate substitute for a record showing," *Goldstein v. Kelleher*, 728 F.2d 32, 37 (1st Cir. 1984), *cert. den.*, 469 U.S. 852 (1984). Petitioners concede that, for "tactical reasons", they failed to mount a *Batson* challenge to Respondents' peremptory strikes at the time of jury selection.[1] As a result of that tactical decision, even if this Court were to consider the element of Petitioners' assertion of the need for an "independent duty", Petitioners have deprived this Court of a record from which to make a determination of the merits of their argument.

As previously stated, *Batson, supra*, permits a party to challenge perceived race-based peremptory challenges by an opponent. This involves a "prima facie case of purposeful discrimination" which is made when the complaining party

---

1. As a result of Petitioners' waiver of a Batson challenge, there is simply no record from which this Court can gauge the accuracy of appellants assertion, except one. A review of the venire list makes clear that of the thirteen potential jurors on the venire list, seven were not seated, presumably because they were peremptorily stricken by the parties. Of these seven, only two are female. Therefore Petitioners' assertion that Respondents struck "four African-American women" cannot be true, since there were not four women available to strike.

establishes facts and circumstances which raise an inference that the peremptory challenge was intended to exclude a juror on account of race. Having made a prima facie case, it becomes the burden of the opposing party to "come forward with a race-neutral explanation for challenging black jurors". *Batson*, 476 U.S. at 97, 106 S. Ct. at 1723.

The so-called "*Batson* challenge" has been extended in recent years to include civil trials, *Edmonson v. Leesville Concrete Co. Inc., supra*, and to instances of perceived gender discrimination, *J.E.B. v. Alabama ex. rel. T.B.*, 511 U.S. 127, 114 S. Ct. 1419, 128 L. Ed. 2d 89 (1994).

Even in a civil action, when a party fails to mount a *Batson* challenge to perceived discriminatorily exercised peremptory challenges, his objection is deemed waived. *Edmonson*, 500 U.S. at 631, 111 S. Ct. at 2089; (". . . The same approach applies in the civil context, and we leave it to the trial courts in the first instance to develop evidentiary rules for implementing our decisions"). *Clark v. Newport News Shipping & Dry Dock Co.*, 937 F.2d 934, 937 (4th Cir. 1991); *Dawson v. Wal-Mart Stores, Inc.*, 978 F.2d 205, 210 (5th Cir. 1992). "Knowing the facts, the party cannot sit idly by, make no objection, and then after a verdict is returned against him, challenge it on the grounds that the jury was not legally constituted and was not a valid jury". *Goldstein v. Kelleher*, 728 F.2d 32, 38 (1st Cir. 1984), *cert. den.*, 469 U.S. 852 (1984). "In the absence of any indication that the jury was unsatisfactory to plaintiffs at the time chosen, we are unwilling to reverse the verdict of a jury that to all appearances was disinterested, competent and suitable". *Goldstein*, 38 (citations omitted).

In *Clark, supra*, the plaintiff, as did Petitioners in this matter, urged plain error as the basis for reversal where he, as here, had failed to object, pursuant to *Batson*, to defendant's peremptory

challenges. The court rejected the plain error argument, and succinctly stated:

> Neither *Batson* nor its progeny suggest it is the duty of the court to act *sua sponte* to prevent discriminatory exclusion of jurors. Rather, even *in criminal cases,* the objection is deemed waived if it is not timely raised "... Appellant's assertion of plain error cannot be supported and he is foreclosed from raising the issue here because of his failure to timely object". *Clark*, 939-40. (Emphasis added).

In this matter, Petitioners', having failed to take advantage of the *Batson* protections against race-based peremptory challenges by an opponent, now request this Court to assume the need for some additional duty in this regard on behalf of civil trial courts. These current efforts to convince this Court that the existing safeguards, of which they chose not to avail themselves, are insufficient is questionable at best. Furthermore, given this Court's repeated visitation to this issue, it is difficult to imagine that the Court would counsel such after-the-fact tactics.

In summary, Petitioners' "independent duty" argument plainly disregards existing judicial safeguards which squarely confront the concerns that they seek to address and the fact that the approach of the trial court below effectuated those safeguards within the context of this case. Furthermore, Petitioners' contention that the trial court had an obligation, *sua sponte*, to conduct a *Batson* inquiry is based upon their patent misstatement of the facts with regard to Respondents use of their peremptory challenges to eliminate African American women and is, therefore, fatally flawed. These realities, coupled with the

Petitioners' inability to cite any case law in support of its claim, renders ineffectual their efforts to demonstrate that this issue amounts to an extraordinary case of peculiar gravity and general importance so as to warrant the granting of a writ of certiorari.

III.

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN ADMITTING THE "TIMELINE OF CARE" AND THE DECISION OF THE COURT OF APPEALS TO AFFIRM THE JUDGMENT IN THIS CASE IS NOT IN CONFLICT WITH THE PERTINENT DECISIONS OF OTHER COURTS OF APPEALS AND, THEREFORE, DOES NOT REQUIRE REVIEW ON CERTIORARI.

Petitioners contend that the lower court abused its discretion in admitting a "Timeline of Care" and that the ruling of the Court of Appeals for the Fourth Circuit relative to the admission into evidence of a "Timeline of Care" places that court in conflict with other circuits "in terms of the interpretation of the importance of the carefully crafted safeguards embodied in the Federal Rules of Evidence pertaining to the admissibility of a summary" (*See* Petitioners' brief, p. 23). In support of this claim, Petitioners rely upon their now well-worn arguments that they were prejudiced by the admission of the "Timeline" because: (1) the "Timeline" was not produced by defense counsel for examination prior to trial; (2) the records that the "Timeline" purported to represent were not voluminous; (3) the "Timeline" was inaccurate; and (4) there existed no foundation for the introduction of the "Timeline".

Fed. R. Evid. 1006 provides in pertinent part:

> The contents of voluminous writings,

> recordings, or photographs which cannot conveniently be examined in court may be presented in the form of a chart, summary, or calculation. The originals, or duplicates, shall be made available for examination or copying, or both, by other parties at reasonable time and place. The court may order that they be produced in court.

Petitioners' contention that they were prejudiced because they were not provided the "Timeline" prior to trial is wholly without merit. By its very terms, Rule 1006 requires *only* that the original (or duplicate) documents shall be made available for examination or copying by an opposing party, and does not refer to production of the "Timeline" itself. *See* J. Weinstein & M. Berger, *Weinstein's Evidence* ¶1006[04] at 1006-8 (1975). In general, equal accessibility by the opposing party to the original document or materials from which a summary is drawn satisfies the requirement that they be made available for examination and copying. *United States v. Strissel*, 920 F.2d 1162, 1166 (4th Cir. 1990). Further, although the underlying documents must be made available for inspection by the opposing party, a summary itself need not be made available before its introduction into evidence. *United States v. Foley*, 598 F.2d 1323 (4th Cir.), *cert.den.*, 444 U.S. 1043, 100 S. Ct. 727, 62 L. Ed. 2d 728 (1979). In fact, Petitioners were provided a copy of the "Timeline" as early as two weeks prior to trial.[2]

As to Petitioners' assertion that the summarized records

---

2. As set forth in Respondents' Statement of the Case, Petitioners' counsel, Lavern Wiley, accompanied by paralegal Sheri-Ann Cowie, by scheduled appointment came to Dr. Lethbridge's counsels' office in an effort, pursuant to the Federal Rules, to exchange trial exhibits and documents. Counsel for AAMC also attended this meeting, during which time appellants were provided a copy of the "Timeline".

were not voluminous, it is sufficient to note that the medical records consisted of documentation of seven days of critical care hospitalization at AAMC as well as hospitalization at University of Maryland Hospital. Interspersed among these voluminous records, encompassing two weeks of hospitalization, were the pages critical to the focus of the issues at trial, the emergency care provided to Midshipman Barr. Rule 1006 is premised upon the common law rule that a party may prove the contents of voluminous writings that cannot be examined in court, *without creating inconvenience or waste of time*, by presenting evidence of their contents in the form of testimonial or written charts, summaries or calculations.[3]

Furthermore, various courts have held that the "voluminous" requirement must not be interpreted literally and restrictively. *United States v. Winn*, 948 F.2d 145, 158 (5th Cir. 1991), *cert. denied*, 503 U.S. 976, 112 S. Ct. 1599, 118 L. Ed. 2d 313 (1992) (citing *United States v. Stephens*, 779 F.2d 232, 238 (5th Cir. 1985).

The last two arguments advanced by the Petitioners, the alleged inaccuracies of the "Timeline" and the lack of a foundation for its admittance, are directly addressed by the Court of Appeals following the court's conclusion that none of the other issues raised on appeal gave cause to reverse the district court. As to these two issues, the court stated:

> We find that the record supports the majority of the information in the summary chart. Any other inaccuracies are immaterial.

---

3. *United States v. Caswell*, 825 F.2d 1228 (8th Cir. 1987) (In *Caswell*, the trial court properly admitted summary charts that were based on testimony at trial; summary witness testimony may be received when it is based on evidence in the case and the witness is available for cross-examination).

> Nonetheless, the summary chart should have been authenticated by its preparer before the district court admitted it. This error does not require reversal, however, given the extensive evidence in the record supporting the jury's verdict.

Petitioners allege that this holding results in a conflict of opinions between the United States Court of Appeals for the Fourth Circuit and other United States Courts of Appeal. In support of this assertion, Petitioners cite to the rulings of the United States Court of Appeals for the Second Circuit in a matter known as *United States v. Citron,* 783 F.2d 307 (2d Cir. 1986) and the United States Court of Appeals for the Ninth Circuit in *United States v. Wood,* 943 F.2d 1048 (9th Cir. 1991). Petitioners' reliance on these cases to support an assertion of a conflict among the Courts of Appeals, thereby necessitating this Court's review, is without merit.

In *Citron*, the defendant was charged with tax evasion and the prosecution presented a chart which purported to show the defendant's available funds without providing explanatory testimony. The trial court, despite finding a lack of foundation for the summary, admitted the chart into evidence. The Court of Appeals found the district court's admittance, without consideration of whether the chart was based on the evidence, an abuse of discretion. Petitioners assert that the Court of Appeals in the case at bar, by failing to reach the same conclusion, has rendered an opinion in conflict with the Second Circuit court's holding.

However, Petitioners fail to cite to the portion of the *Citron* decision most pertinent to this case. The *Citron* court, citing to *United States v. Conlin,* 551 F.2d 534 (2d Cir. 1977), *cert. denied,* 434 U.S. 831, 98 S. Ct. 114, 54 L. Ed. 2d 91 (1977), went one

step further in its analysis and gave consideration to the question of whether the evidence presented in the *Citron* case was overwhelmingly in support of the jury's verdict. *Citron*, 317. Given the record before it, the *Citron* court concluded that it was not.

Similarly, the same court, in *Conlin*, conducted the same analysis after determining that the summary was not supported by the record. The court held as follows: "We conclude, however, from a study of the entire record that in the circumstances of this case this error did not deprive appellant of a fair trial" and "proof of appellant's guilt [was] overwhelming." *Conlin*, 539. This analysis represents the exact approach taken by the Court of Appeals for the Fourth Circuit in the case at bar. Even assuming, *arguendo*, that the "Timeline" was not supported by the record, a finding which the court did not reach[4] , the court concluded that the lack of authentication by the preparer did not require reversal "given the extensive evidence in the record supporting the jury's verdict." The alleged conflict between this decision and the opinions of the Second Circuit Court of Appeals simply does not exist.

Next, Petitioners assert that the holding of the United States Court of Appeals for the Ninth Circuit in *United States v. Wood, supra*, emphasizing an important distinction between a summary admitted pursuant to Federal Rules of Evidence Rule 1006 and a summary admitted as demonstrative evidence, is in conflict with the holding in this case. Therein, the court held that summaries of testimony or documents actually admitted into evidence as pedigogical devices "should not be admitted into evidence or otherwise be used by the jury during deliberations." *Wood*, 1053. Given the fact that the entire medical record

4. The court expressly found "that the record supports the majority of the information in the summary chart. Any other inaccuracies are immaterial." (App. 3A.)

underlying the "Timeline" was introduced into evidence in the case at bar, Petitioners' assert, the Fourth Circuit's countenance of its admission somehow renders its holding in conflict with that of the Ninth Circuit. The argument is unpersuasive and of no consequence.

First, commentators have readily pointed out that the referenced holding in *Wood* should not be followed:

> As the case itself recognizes, it is difficult to distinguish the two situations and then hard if not impossible to defend the position that a chart summarizing not admitted evidence can, in the court's discretion, be sent to the jury room but that a similar chart summarizing admitted evidence offered by an opposing party may not.

M. Graham, *Federal Practice and Procedure: Federal Rules of Evidence*, Sec. 7031 (1997 Pocket Part).

Petitioners' assertion that the Supreme Court ought to grant a writ of certiorari to review a decision that, in all regards, is consistent with all other Courts of Appeal, barring one decision that has been expressly criticized, patently ignores the countenance of Rule 10 of the Rules of the Supreme Court that a petition for a writ of certiorari will be granted "only for compelling reasons."

Finally, and perhaps most importantly, the opinion of the United States Court of Appeals for the Fourth Circuit in this matter was unpublished. Pursuant to Local Rule 36(c) of the Local Rules for the United States Court of Appeals for the Fourth Circuit, unpublished opinions are not binding precedent in the Fourth Circuit. Assuming *arguendo* that the decision somehow

is in conflict a decision of another Court of Appeal, such a conflict between an unpublished decision that is not binding precedent and a widely criticized decision is not worthy of the Supreme Court's review on certiorari.

In light of the fact that the "Timeline" was a detailed, accurate and objective compilation derived from voluminous medical records and with sufficient detrimental support to warrant its inclusion into evidence, it is clear that the trial court's admission of the summary does not amount to an abuse of discretion. Furthermore, the Court of Appeals, following its conclusion that the "Timeline" should have been authenticated by its preparer prior to admittance, properly considered the extent of the evidence in the record supporting the jury's verdict. This analysis is consistent with that order taken by other Courts of Appeal and, therefore, is not appropriate for review by this Court on certiorari.

CONCLUSION

For all the foregoing reasons, Respondents pray that this Honorable Court will deny Petitioners' Petition for Writ of Certiorari.

Respectfully submitted,

KURT D. KARSTEN
Counsel of Record
COWDREY, THOMPSON
& KARSTEN, P.A.
Attorneys for Respondent
Anne Arundel Medical Center, Inc.
Ridgely Oaks Professional Center
621 Ridgely Avenue
Suite 402
Annapolis, Maryland 21401
(410) 841-1938

JAMES T. WHARTON
CHRISTIAN A. LODOWSKI
WHARTON, LEVIN,
EHRMANTRAUT, KLEIN
& NASH, P.A.
Attorneys for Respondent
Rosemary Lethbridge, M.D.
104 West Street
P.O. Box 551
Annapolis, Maryland 21401-0551
(410) 263-5900